

5-4-2012

Izaguirre v. R & L Carriers Shared Services Agency's Record Dckt. 39750

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

LAW CLERK

RUBIO IZAGUIRRE,

Claimant/Appellant,

v.

R&L CARRIERS SHARED SERVICES,
L.L.C.,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Surety,

Defendants/Respondents.

SUPREME COURT NO. 39750-2012

AGENCY'S RECORD



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Claimant/Appellant:

Rubio Izaguirre

Attorney for Claimant/Appellant:

Richard S. Owen
P.O. Box 278
Nampa, ID 83653

Defendants/Respondents:

R&L Carriers Shared Services, L.L.C., Employer,
and Zurich American Insurance Co., Surety

Attorney for Defendants/Respondents:

Jon Bauman
Kristina Wilson
P.O. Box 1539
Boise, ID 83701

SEE AUGMENTATION RECORD

AGENCY'S RECORD

(S.C. Docket # 39750-2012 Re: Rubio Izaguirre) - 1

39750

COPY

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant/Appellant,

v.

R&L CARRIERS SHARED SERVICES,
L.L.C.,

Employer,

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AGENCY'S RECORD

(S.C. Docket # 39750-2012 Re: Rubio Izaguirre) - 1

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**REPORTER'S TRANSCRIPT: TAKEN JULY 26, 2011 RE: RUBIO IZAGUIRRE
TO BE LODGED WITH THE SUPREME COURT.**

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1.	Accident Report	pp. 1-6
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3.	Medical records from Dr. William Lindner	pp. 1-26
4.	Medical records from Dr. Mark S. Williams	pp. 1-4
5.	St. Alphonsus KEY Functional Capacity Assessment.....	pp. 1-8
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10.	Records from Gallagher Bassett Services.....	pp. 1-21
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12.	Report from Martha Peterson.....	p. 1
13.	Report from Kurt Holzer.....	pp. 1-6
14.	Medical Bill Recap	not numbered

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1.	Medical records from West Valley Medical Center, 7/17/1995 -2/22/2010.....	010001-111
2.	Medical records from St. Alphonsus Medical Group, 12/26/1995 - 5/7/2008.....	020008-027
3.	West Idaho Orthopedics & Sports Medicine, 1/8/1996 - 2/9/2000	030001-016
4.	Medical records from Betty F. Ball, M.D., 1/18/1996.....	040001-002
5.	Medical records from Saltzer Medical Group, 9/3/2002 - 7/13/2007.....	050001-137
6.	R&L Carriers Shared Services Personnel File of Rubio Izaguirre, 5/5/2006 – 6/16/2009	R&L Carriers 000001-031
7.	Medical records from Caldwell Physical Therapy, 3/19/2008 – 4/24/2008	060001-27
8.	First Report of Injury or Illness, 3/21/2008	pp. 1-2
9.	Medical records from Ada Orthopaedic (Dr. Lindner, Dr. Moore and Dr. Williams), 5/13/2008 – 1/31/2011	070001-41
10.	Transcript of Recorded Interview of Rubio Izaguirre, 5/28/2008	not numbered
11.	Attorney/Client Contract, 6/27/2008	pp. 1-2
12.	Worker's Compensation Contract, 6/27/2008	pp. 1-2

13.	Medical records from St. Alphonsus Regional Medical Center, 10/2/2008 – 10/9/2008	080001-43
14.	Medical records from Intermountain Physical Therapy, 10/20/2008 – 1/5/2009	090001-36
15.	Idaho Industrial Commission Rehabilitation Division Records, 12/12/2008 – 11/15/2010	IRCD 000001-23
16.	Medical records from Orthopedic Health Care Clinic (IME of Dr. Paul Collins), 4/6/2009	100001-04
17.	Medical records from St. Alphonsus Rehabilitation Services, 6/3/2009	110001-07
18.	D. Scott Summer letter to Ameri-Co Carriers re offer to settle, 6/16/2009	not numbered
19.	Personnel File Obtained from Plaintiff's Current Employer, Old Dominion Freight Lines, 6/29/2009 – 6/15/2011	Old Dominion 0000001-134
20.	Release of all Claims and Indemnity Agreement, 10/22/2009	pp. 1-4
21.	D. Scott Summer letter to Rubio and Sofia Izaguirre, 11/13/2009	not numbered
22.	D. Scott Summer letter to Lene O'Dell with enclosures, 1/11/2010	pp. 1-16
23.	Worker's Compensation Complaint, 7/9/2010	pp. 1-3
24.	Answers to Claimant's Interrogatories to Defendants, 12/14/2010	pp. 1-10
25.	Claimant's Answers to Defendant's Interrogatories to Claimant, 12/16/2010	pp. 1-16
26.	Claimant's Responses to Defendants' Supplemental Requests for Production of Documents to Claimant, 4/13/2011	pp. 1-6
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28.	Defendants' Response to Claimant's Supplemental Request for Production of Documents (with attached documents), 5/23/2011	pp. 1-26
29.	Second Supplemental Responses to Claimant's Requests for Production of Documents to Defendants (Supplements Request for Production No. 2), 5/31/2011	pp. 1-9
30.	Second Supplemental Answers to Claimant's Interrogatories to Defendants (Supplements Interrogatory No. 6), 5/31/2011	pp. 1-3
31.	Third Supplemental Responses to Claimant's Requests for Production of Documents of Documents to Defendants (Supplements Request for Production Nos. 1, 4, 8 and 11), 6/6/2011	pp. 1-26
32.	Deposition of Rubio Izaguirre, 6/6/2011	not numbered
33.	Deposition of Sofia Izaguirre, 6/6/2011	not numbered
34.	Claimant's Supplemental Answers to Defendants' Interrogatories to Claimant, 6/8/2011	pp. 1-6
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36.	Claimant's Responses to Defendants' Supplemental Requests for Production of Documents to Claimant, 6/8/2011	pp. 1-3
37.	Third Supplemental Answers to Claimant's Interrogatories to Defendants, 6/30/2011	pp. 1-6

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38. Expert Report of Merlyn Clark with attached chronology,
7/12/2011 R&L Carriers 000043-068
39. Claimant's Second Supplemental Answers to Defendants' Interrogatories
to Claimant, 7/12/2011..... pp. 1-10
40. Fourth Supplemental Answers to Claimant's Interrogatories to Defendants
(Supplements Interrogatory No. 12), 7/13/2011 pp. 1-4

ADDITIONAL DOCUMENTS:

1. Videotaped Deposition of Rubio Izaguirre, taken June 6, 2011, found at
Defendants' Exhibit 32.
2. Videotaped Deposition of Juana Sofia Izaguirre, taken June 6, 2011, found at
Defendants' Exhibit 33.
3. Claimant's Pre-Hearing Brief, filed July 18, 2011
4. Claimant's Opening Brief, filed August 22, 2011
5. Defendants' Post-Hearing Brief, filed September 12, 2011
6. Claimant's Reply Brief, filed September 26, 2011

SEND ORIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

**WORKERS' COMPENSATION
COMPLAINT**

CLAIMANT'S (INJURED WORKER) NAME, ADDRESS, AND TELEPHONE NUMBER Rubio Izaguirre 3517 Hermosa Ave Caldwell, ID 83605 Phone: (208) 453-1584		CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER D. SCOTT SUMMER, PLLC P.O. Box 1095 Caldwell, ID 83606 Phone: (208) 455-8692	
EMPLOYER'S NAME AND ADDRESS (at time of injury) R&L Carriers Shared Services, LLC 600 Gillam Road Wilmington, OH 45177		WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Lene O'Dell Senior Claims Adjuster GALLAGHER BASSETT SERVICES 720 Park Blvd. Ste. # 125 Boise Idaho 83712	
CLAIMANT'S SOCIAL SECURITY NO. 546-25-0188	CLAIMANT'S BIRTHDATE 07-16-1960	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE 02-28-2008	
STATE AND COUNTY IN WHICH INJURY OCCURRED Utah, Box Elder County		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: \$, PURSUANT TO IDAHO CODE § 72-415	
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED) Claimant was driving a tractor-trailer rig and was hit by another tractor-trailer rig.			
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE Head, neck, chest, upper body and left knee. His left knee has required extensive surgery and will require further surgery in the future.			
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME? Additional medical benefits, TTD benefits, PPI benefits and attorney fees for unreasonable denial and/or delay in benefits due.			
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER 02-28-2008		TO WHOM NOTICE WAS GIVEN Supervisor	
HOW NOTICE WAS GIVEN: <input checked="" type="checkbox"/> ORAL <input checked="" type="checkbox"/> WRITTEN <input type="checkbox"/> OTHER, PLEASE SPECIFY			
ISSUE OR ISSUES INVOLVED			

Is Claimant due additional statutory benefits as outlined above.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☐ YES ☒ NO IF SO, PLEASE STATE WHY.

**NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE IN ACCORDANCE
WITH IDAHO CODE § 72-334 AND FILED ON FORM I.C. 1002**

WORKERS' COMPENSATION COMPLAINT

ORIGINAL

CLAIMANT'S (INJURED WORKER) NAME, ADDRESS, AND TELEPHONE NUMBER Rubio Izaguirre [REDACTED] Caldwell, ID 83605 Phone: [REDACTED]		CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER D. SCOTT SUMMER, PLLC P.O. Box 1095 Caldwell, ID 83606 Phone: (208) 455-8692
EMPLOYER'S NAME AND ADDRESS (at time of injury) R&L Carriers Shared Services, LLC 600 Gillam Road Wilmington, OH 45177		WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Lene O'Dell Senior Claims Adjuster GALLAGHER BASSETT SERVICES 720 Park Blvd. Ste. # 125 Boise Idaho 83712
CLAIMANT'S SOCIAL SECURITY NO. [REDACTED]	CLAIMANT'S BIRTHDATE [REDACTED]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE 02-28-2008
STATE AND COUNTY IN WHICH INJURY OCCURRED Utah, Box Elder County		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: \$, PURSUANT TO IDAHO CODE § 72-419

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)

Claimant was driving a tractor-trailer rig and was hit by another tractor-trailer rig.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE

Head, neck, chest, upper body and left knee. His left knee has required extensive surgery and will require further surgery in the future.

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?

Additional medical benefits, TTD benefits, PPI benefits and attorney fees for unreasonable denial and/or delay in benefits due.

DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER
02-28-2008

TO WHOM NOTICE WAS GIVEN
Supervisor

HOW NOTICE WAS GIVEN: ☒ ORAL ☒ WRITTEN ☐ OTHER, PLEASE SPECIFY

ISSUE OR ISSUES INVOLVED

Is Claimant due additional statutory benefits as outlined above.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☐ YES ☒ NO IF SO, PLEASE STATE WHY.

NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE IN ACCORDANCE
WITH IDAHO CODE § 72-334 AND FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME ADDRESS)
West Valley Medical Center
St. Alphonsus Occupational Therapy
Caldwell Physical Therapy
Ada Orthopaedic
Intermountain Physical Therapy

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE?

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? \$ All medicals
WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? \$ None

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

☒ YES ☐ NO

DATE

June 25, 2010

SIGNATURE OF CLAIMANT OR ATTORNEY

TYPE OR PRINT NAME: D. Scott Summer of the firm D. SCOTT SUMMER, PLLC

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY
FILING COMPLAINT

DATE OF DEATH

RELATION TO DECEASED CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED?

☐ YES ☐ NO

DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?

☐ YES ☐ NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of July, 2010, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

SURETY'S NAME AND ADDRESS

R&L Carriers Shared Services, LLC
600 Gillam Rd.
Wilmington, OH 45177

GALLAGHER BASSETT-
720 Park Blvd, Ste 125 Services
BOISE, ID. 83712

via: ☐ personal service of process

☒ regular U.S. Mail

&
FAX

via: ☐ personal service of process

☒ regular U.S. Mail

&
FAX

Signature

D. Scott Summer
Print or Type Name

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

Patient Name: Rubio Izaquirre
Birth Date: [REDACTED]
Address: [REDACTED]
Phone Number: [REDACTED]
SSN or Case Number: [REDACTED]

(Provider Use Only)
Medical Record Number: _____
☐ Pick up Copies ☐ Fax Copies # _____
☐ Mail Copies _____
ID Confirmed by: _____

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:
Provider Name – must be specific for each provider

To: _____
Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City State Zip Code

Purpose or need for data: _____
(e.g. Worker's Compensation Claim)

Information to be disclosed: _____ Date(s) of Hospitalization/Care: _____

- ☐ Discharge Summary
- ☐ History & Physical Exam
- ☐ Consultation Reports
- ☐ Operative Reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☐ Entire Record
- ☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug/Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Rubio Izaquirre 6-25-10
Signature of Patient Date

Signature of Legal Representative & Relationship to Patient/Authority to Act Date

Anne S. [Signature] 6-25-10
Signature of Witness Title Date
Complaint – Page 3 of 3

ORIGINAL

ANSWER TO COMPLAINT

I.C. NO.: 2008-011032

INJURY DATE: 02-28-08

☒ The above-named employer or employer/surety responds to Claimant's Complaint by stating:☐ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

CLAIMANT'S NAME AND ADDRESS Rubio Izaguirre 3517 Hermosa Ave. Caldwell, ID 83605	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS D. Scott Summer P.O. Box 1095 Caldwell, ID 83606
EMPLOYER'S NAME AND ADDRESS R&L Carriers Shared Services, LLC 600 Gillam Road Wilmington, OH 45177	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Zurich American Insurance Co. C/O Gallagher Bassett 720 Park Blvd., Ste. 125 Boise, ID 83712
ATTORNEY REPRESENTING EMPLOYER/SURETY (NAME AND ADDRESS) ALAN R. GARDNER, ESQ. GARDNER & BREEN P.O. BOX 2528 BOISE, ID 83701	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

 RECEIVED
 JUL 23 11:10
 INDUSTRIAL COMMISSION

IT IS: (Check One)		
Admitted	Denied	
X		1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
X		2. That the employer/employee relationship existed.
X		3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
	X	4. That the condition for which benefits are claimed was caused partly <input type="checkbox"/> entirely <input type="checkbox"/> by an accident arising out of and in the course of Claimant's employment.
NA		5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
X		6. That the notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
	X	7. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ _____.
X		8. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

9. What benefits, if any, do you concede are due Claimant? None.

5

10. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

1. Defendants deny all allegations of the Complaint not admitted herein.
2. Defendants deny Claimant is entitled to any medical expenses beyond any previously paid or acknowledged.
3. Defendants deny Claimant is entitled to temporary total disability.
4. Defendants deny Claimant is entitled to additional PPI.
5. Defendants deny Claimant is entitled to attorney fees.
6. Defendants deny that they have been unreasonable in any aspect of handling the claim.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule 3.D., Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO			
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE:			
Amount of Compensation paid to date			Dated 7-23-10
PPI/PPD	TTD	Medical	
			Signature of Defendant or Attorney

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July 2010, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT/ATTORNEY
NAME AND ADDRESS

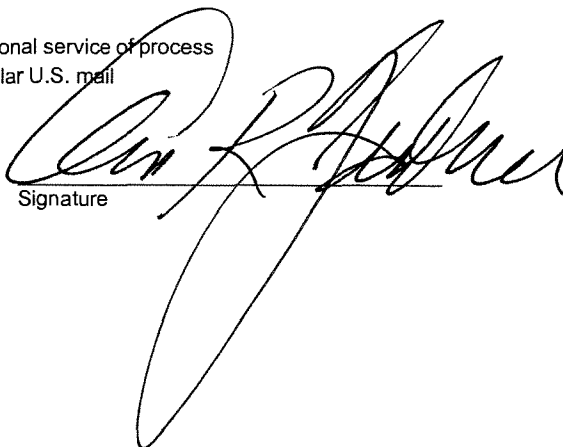
Rubio Izaguirre
C/O D. Scott Summer
P.O. Box 1095
Caldwell, ID 83606

EMPLOYER/SURETY
NAME AND ADDRESS

R&L Carriers Shared Services, LLC
C/O Gallagher Bassett
720 Park Blvd., Ste. 125
Boise, ID 83712

via ☐ personal service of process
☒ regular U.S. mail

via ☐ personal service of process
☒ regular U.S. mail


Signature

Answer—Page 2 of 2

ALAN R. GARDNER, ESQ. (ISB No. 2342)
 GARDNER & BREEN
 1410 W. Washington - 83702
 Post Office Box 2528
 Boise, Idaho 83701
 Telephone: (208) 387-0881
 Facsimile: (208) 387-3501

2010 JUL 23 P 1:10
 RECEIVED
 INDUSTRIAL COMMISSION

Attorney for **Defendants**

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

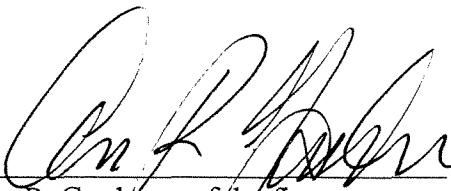
RUBIO IZAGUIRRE,)	
)	
Claimant,	)	I.C. Case No. 2008-011032
)	
v.	)	REQUEST FOR STATUS
	)	CONFERENCE
R&I CARRIERS SHARED)	
SERVICES, LLC,)	
)	
Employer,)	
)	
and)	
)	
ZURICH AMERICAN INSURANCE CO.,)	
)	
Surety,)	
Defendant.)	
)	

COME NOW the above-named Defendants, and request that the Industrial Commission set a status conference in the above matter. The conference is requested for the following grounds and reasons:

- a. Claimant has received a 3rd party recovery in the amount of \$200,000.
- b. To date, \$45,000 (25% attorney fee balance to surety) has been paid to Defendants for reimbursement of subrogation under 72-223.

- c. Because of this factor, a significant cushion from the 3rd party recovery which would not be exceeded by Claimant's conditions exists. Thus, every dollar that is incurred for future benefits, would be paid only at 25% as a reimbursement to Claimant for his attorney fee recovery in the 3rd party, the percentage agreement reached with counsel and adjuster.
- d. Given this reality, and Defendants perspectives of the reality of the case, incurring a great deal of litigation, time and costs does not appear to be productive. Thus, the Defendants would like an opportunity to discuss options with the Commission to determine how best this case might be resolved given this scenario.

DATED this 23rd day of July, 2010.


Alan R. Gardner - of the firm
GARDNER & BREEN
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of July, 2010, I caused a true and correct copy of the foregoing to be served upon:

D. Scott Summer
P.O. Box 1095
Caldwell, ID 83606

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.


ALAN R. GARDNER

ALAN R. GARDNER, ESQ. (ISB No. 2342)
GARDNER & BREEN
1410 West Washington - 83702
Post Office Box 2528
Boise, Idaho 83701
Telephone: (208) 387-0881
Facsimile: (208) 387-3501

Attorney for Defendants

ORIGINAL

2010 SEP - 21 P 4:52

RECEIVED
INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,)

Claimant,)

v)

R&I CARRIES SHARED)
SERVICES, LLC,)

Employer,)

and)

ZURICH AMERICAN INSURANCE CO.)

Surety,)

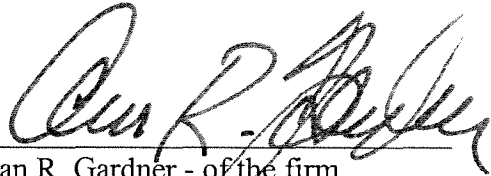
Defendants.)

I.C. No. 2008-011032

**MOTION TO COMPEL ANSWERS TO
INTERROGATORIES AND RESPONSE
TO REQUEST FOR PRODUCTION OF
DOCUMENTS TO CLAIMANT**

COME NOW the above-named Defendants, by and through their attorney of record, and move the Commission to enter an Order compelling Claimant to answer the *Interrogatories and Requests for Production of Documents* propounded to him on or about the 27th day of July, 2010, pursuant to the rules and regulations of the Idaho Industrial Commission.

DATED This 2nd day of September, 2010.

A handwritten signature in black ink, appearing to read "Alan R. Gardner", is written over a horizontal line.

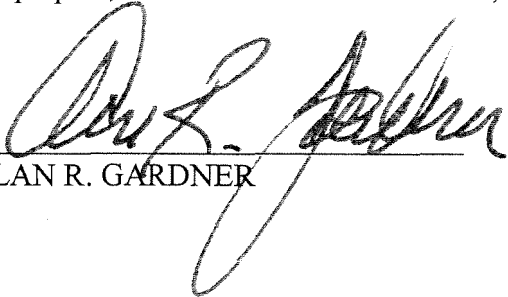
Alan R. Gardner - of the firm
GARDNER & BREEN
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of September, 2010, I caused a true and correct copy of the foregoing to be served upon:

D. Scott Summer
P.O. Box 1095
Caldwell, ID 83606

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.


ALAN R. GARDNER

ORIGINAL

ALAN R. GARDNER, ESQ. (ISB No. 2342)
GARDNER & BREEN
1410 W. Washington - 83702
Post Office Box 2528
Boise, Idaho 83701
Telephone: (208) 387-0881
Facsimile: (208) 387-3501

2010 OCT 15 P 4:35

RECEIVED
INDUSTRIAL COMMISSION

Attorney for **Defendants**

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

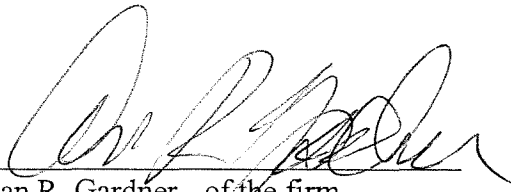
RUBIO IZAGUIRRE,)	
)	
Claimant,	)	I.C. Case No. 2008-011032
)	
v.	)	MOTION TO DISMISS
)	
R & I CARRIERS SHARED)	
SERVICES, LLC,)	
)	
Employer,)	
)	
and)	
)	
ZURICH AMERICAN INSURANCE CO.)	
)	
Surety,)	
Defendant.)	
)	

COME NOW the above named Defendants, and move the Commission for an Order
Dismissing Complaint for the following grounds and reasons:

- a. Defendants served Claimant with discovery on July 27, 2010.
- b. Defendants sent Claimant a reminder letter to answer discovery on September 1, 2010.

- c. Defendants filed a Motion to Compel on September 2, 2010.
- d. The Commission issued an Order Compelling Claimant to Answer Discovery on September 17, 2010.
- e. To date, Claimant has not answered discovery.

DATED this 15th day of October, 2010.


Alan R. Gardner - of the firm
GARDNER & BREEN
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of October 2010, I caused a true and correct copy of the foregoing to be served upon:

D. Scott Summer
P.O. Box 1095
Caldwell, ID 83606

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.


ALAN R. GARDNER

RICHARD S. OWEN, ESQ. (ISB #2687)

206 Twelfth Avenue Road

Post Office Box 278

Nampa, Idaho 83653

Telephone: (208) 466-8700

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

**R & L CARRIERS SHARED
SERVICES, LLC,**

Employer,

and

ZURICH AMERICAN INS. CO.,

Surety,

Defendants.

I. C. No. 2008-011032

REQUEST FOR CALENDARING

1. Claimant will be prepared to proceed with hearing after January 1, 2011.
2. Issues: Need for continued medical care, total temporary disability benefits, retraining, determination of permanent partial impairment; determination of permanent partial disability which accounts for all medical and non-medical factors and retention of jurisdiction past the statute of limitations.
3. Location of Hearing: Boise, Idaho.
4. Unavailable dates: January 1, 10, 14-18, 21, 28, 31; February 8-14, 21; March 1, 7-

REQUEST FOR CALENDARING - PG. 1

22, 25, 30; April 6, 22, 27-29; May 2, 30, 2011.

5. Length of Hearing: 1/2 day.

DATED This 16 day of December, 2010.

By: *Richard S. Owen*
Richard S. Owen

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 16 day of December, 2010, a true and correct copy of the foregoing REQUEST FOR CALENDARING was mailed, U. S. Postage prepaid, to:

Alan Gardner
P.O. Box 2528
Boise, Idaho 83701

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.

Richard S. Owen
Richard S. Owen

RICHARD S. OWEN, ESQ. (ISB #2687)

206 Twelfth Avenue Road
Post Office Box 278
Nampa, Idaho 83653
Telephone: (208) 466-8700

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

**R & L CARRIERS SHARED
SERVICES, LLC,**

Employer,

and

ZURICH AMERICAN INS. CO.,

Surety,

Defendants.

I. C. No. 2008-011032

**REQUEST FOR
STATUS CONFERENCE**

COMES NOW Claimant, by and through his attorney of record, hereby request this
Industrial Commission to set this case for a status conference for purposes of setting a hearing date.

DATED This 27 day of December, 2010.

By: _____

Richard S. Owen
Richard S. Owen

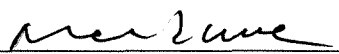
REQUEST FOR STATUS CONFERENCE - PG. 1

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 27 day of December, 2010, a true and correct copy of the foregoing REQUEST FOR CALENDARING was mailed, U. S. Postage prepaid, to:

Alan R. Gardner
P.O. Box 2528
Boise, Idaho 83701

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.



Richard S. Owen

Jon M. Bauman
Kristina J. Wilson
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701-1539
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
Bauman - ISB #2989
Wilson - ISB #7962

2011 MAR 21 P 4: 16
RECEIVED
INDUSTRIAL COMMISSION

Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION

FOR THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

R&L CARRIERS SHARED
SERVICES, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Surety,
Defendants.

I.C. No. 2008-011032

MOTION TO BIFURCATE AND
STAY PROCEEDINGS FOR
DETERMINATION OF NOVEL ISSUES OF
LAW

MOTION TO BIFURCATE AND STAY PROCEEDINGS FOR
DETERMINATION OF NOVEL ISSUES OF LAW- 1

I. INTRODUCTION

Employer R&L Carriers Shared Services, LLC (“R&L Carriers”), by and through its attorneys of record, Elam & Burke, P.A., hereby submits this Motion to Bifurcate and Stay Proceedings for Determination of a Novel Issue of Law. R&L Carriers moves pursuant to Rules 3 and 8, J.R.P., and other applicable law, that the Idaho Industrial Commission (“Commission”) enter an order bifurcating the subrogation issues from the issues presented for hearing on the underlying workers’ compensation benefits claim. Claimant Rubio Izaguirre (“Claimant”) contends that R&L Carriers’ and Zurich American Insurance Company’s (“Surety”) right of subrogation is subject to a limitation based on the purported recovery of Claimant’s wife for loss of consortium. An initial determination by the full Commission of whether Claimant’s contention is supported by the law will materially advance the resolution of this litigation.

The potential limitation on R&L Carriers’ right of subrogation raised by Claimant’s contention requires that the Commission interpret Idaho law to determine issues including: (1) the threshold question of whether the Release of All Claims permits or effects a limitation on R&L Carriers’ right of subrogation guaranteed by Idaho Code § 72-223; (2) whether the characterization of the recovery as among Claimant, his wife, and the third parties is binding on R&L Carriers; and (3) whether workers’ compensation benefits are community property and, if so, whether a recovery for loss of consortium is also community property. This case presents issues of first impression and involves potentially complex issues of law, if not of fact. Therefore, R&L Carriers requests the full Commission adjudicate the subrogation issues.

II. FACTUAL AND PROCEDURAL BACKGROUND

Claimant filed his Workers' Compensation Complaint on June 25, 2010, seeking workers' compensation benefits for injuries allegedly arising out of a February 28, 2008, motor vehicle accident. ("Complaint.") At the time of the accident, Claimant was driving a semi-truck for R&L Carriers when another semi-truck hit his truck and caused it to roll. (A true and correct copy of Claimant's Answers to Defendants' Interrogatories to Claimant, p. 5, Answer No. 6, is attached hereto as Exhibit A.) Claimant and his wife reached a settlement with Ameri-Co Carriers, Inc. and Jimmy L. Crossland, third parties, in the amount of \$200,000 with respect to the accident. Claimant and his wife signed a Release of All Claims on October 15, 2009, memorializing that settlement. (A true and correct copy of the Release of All Claims and Indemnity Agreement is attached hereto as Exhibit B.) Claimant now contends that R&L Carriers should not receive credit for at least half of the \$200,000 settlement, as half of the settlement proceeds was supposedly allocated to a loss of consortium claim by Claimant's wife. (A true and correct copy of the November 13, 2009, letter of D. Scott Summer, former legal counsel for Claimant, is attached hereto as Exhibit C.)

III. ANALYSIS

R&L Carriers requests bifurcation of the threshold subrogation issues from the issues presented for hearing on the underlying workers' compensation benefits claim. Claimant contends that R&L Carriers should not receive credit for at least half of the \$200,000 settlement, due to an allocation to a loss of consortium claim by Claimant's wife. (Ex. C.) R&L Carriers requests that the Commission determine what portion of the third party recovery is subject to its

future subrogated interest prior to a hearing on liability. This determination will necessarily involve analysis of issues including, but not limited to, (1) the threshold question of whether the Release of All Claims permits or effects a limitation on R&L Carriers' right of subrogation guaranteed by Idaho Code § 72-223; (2) whether the characterization of the recovery as among Claimant, his wife, and the third parties is binding on R&L Carriers; and (3) whether workers' compensation benefits are community property and, if so, whether a recovery for loss of consortium is also community property.

Idaho Code § 72-223 provides, in pertinent part:

If the amount recovered from the third party exceeds the amount of the subrogated portion payable to the employer for past compensation benefits paid, then to the extent the employer has a future subrogated interest in that portion of the third party recovery paid to the employee, the employer shall receive a credit against its future liability for compensation benefits.

I.C. § 72-223(5). "The dual purposes of subrogation under I.C. § 72-223 are to achieve an equitable distribution between responsible parties 'by assuring that the discharge of an obligation be paid by the person who in equity and good conscience ought to pay it' and 'to prevent the injured claimant from obtaining a double recovery for an injury.'" *Struhs v. Protection Techs., Inc.*, 133 Idaho 715, 719, 992 P.2d 164, 168 (1999) (quoting *Presnell v. Kelly*, 113 Idaho 1, 3, 740 P.2d 43, 45 (1987)). "The plain wording of the statute entitles employers to benefit from third party recoveries to the extent of their compensation liability, whether the employer has already paid the compensation or the compensation liability remains to be paid in the future." *Cameron v. Minidoka County Highway Dist.*, 125 Idaho 801, 803, 874 P.2d 1108, 1110 (1994). In *Cameron*, the Court found it was undisputed that the claimants' recovery from the third party

MOTION TO BIFURCATE AND STAY PROCEEDINGS FOR
DETERMINATION OF NOVEL ISSUES OF LAW- 4

“not only reimbursed the surety for the compensation benefits already paid to the claimants, it also extinguished all of the surety’s liability to pay future compensation.” *Id.*

First, the Commission should determine the potential effect of the Release of All Claims and Indemnity Agreement on R&L Carrier’s right of subrogation. (*See* Ex. B.) In the Release, Claimant and his wife appear to have agreed to satisfy all subrogated interests. (*Id.*) The Commission’s determination as to the effect of that Release will significantly impact R&L Carriers’ right of subrogation.

Second, the Idaho Supreme Court has held that “an employee and third party’s unilateral actions cannot restrict an employer’s subrogation rights.” *Struhs*, 133 Idaho at 721, 992 P.2d at 170. In *Struhs*, the settlement characterized the claimant’s recovery as “general damages.” *Id.* The Court found that “[e]mployers have a statutory right to subrogation, and any characterization of damages to which the employer is not privy cannot change the employer’s statutory rights.” *Id.* A question then exists as to whether the letter of D. Scott Summer, and/or the Release, unilaterally restricts R&L Carriers’ subrogation rights. These are novel and potentially complex questions of law.

Finally, whether workers’ compensation benefits are community property and, if so, whether proceeds of settlement ostensibly obtained for loss of consortium would also be considered community property is an issue of first impression in Idaho which will require an adjudication by the full Commission. J.R.P. 8(C)(1)(h). In *Cook v. Cook*, 102 Idaho 651, 637 P.2d 799 (1981), the Idaho Supreme Court stated: “It is a basic concept of community property law that all property acquired during marriage is presumed to be community property. The same

is true in the case of workmen's compensation benefits, particularly since it is unforeseeable if or when a marriage will end in divorce." 102 Idaho at 654, 637 P.2d at 802. The Court also stated that the "dispositive question in classifying work[er's] compensation benefits as community or separate property, therefore, is not whether the right to receive benefits vested during marriage, but rather to what extent the award compensates for loss of earning capacity during marriage." *Id.* In analyzing I.C. § 32-903¹, the Court concluded that property acquired during marriage as compensation for a right personal to an injured spouse alone is the separate property of the injured spouse. *Id.*

Research has identified no case law in Idaho regarding whether proceeds recovered for a loss of consortium claim can be excluded from community property. In Idaho, loss of consortium is considered "a wholly derivative cause of action contingent upon a third party's tortious injury to a spouse." *Jeremiah v. Yanke Mach. Shop, Inc.*, 131 Idaho 242, 249, 953 P.2d 992, 999 (1998) (quoting *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 394, 690 P.2d 324, 329 (1984)). The Idaho Supreme Court has held "that a wife's claim for loss of consortium against a direct employer, because of its derivative nature, is barred by the exclusive remedies required by the workmen's compensation statutes." *Runcorn*, 107 Idaho at 394, 690 P.2d at 329 (citing *Coddington v. City of Lewiston*, 96 Idaho 135, 525 P.2d 330 (1974)). The Court of Appeals has further stated that an insurer's liability for a loss of consortium claim is included

¹ Idaho Code § 32-903 states: "All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by either by [sic] gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of moneys or other property, shall remain his or her sole and separate property."

within the policy limits of liability to the injured spouse. *Buckley v. Orem*, 112 Idaho 117, 123, 730 P.2d 1037, 1043 (Ct. App. 1986). However, no authority has been found addressing whether proceeds of settlement for loss of consortium would be considered community property in the workers' compensation setting, and other jurisdictions are split on the question.

Bifurcation is appropriate, as an initial resolution of the subrogation issue will simplify any subsequent hearing on Claimant's workers' compensation benefits claim and may obviate the need for a hearing. Such a resolution also stands to contribute to the likelihood of settlement of the other issues pending in the underlying claim, thereby materially advancing the resolution of this matter. Therefore, R&L Carriers requests a stay of proceedings on Claimant's workers' compensation benefits claim until the full Commission has resolved the subrogation issue.

Furthermore, as this is a case of first impression and involves novel and/or complex issues of law and potentially of fact, R&L Carriers requests adjudication by the full Commission of the subrogation issues. J.R.P. 8(C)(1)(h).

IV. CONCLUSION

For the foregoing reasons, R&L Carriers respectfully requests that the Commission enter an order bifurcating the subrogation issues from Claimant's workers' compensation benefits claim, and staying proceedings on the workers' compensation benefits claim pending resolution of the subrogation issues. R&L Carriers further requests a full Commission hearing on the subrogation issues.

DATED this 21 day of March, 2011.

ELAM & BURKE, P.A.

By: 

Jon M. Bauman, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of March, 2011, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Richard Owen
RICHARD OWEN LAW OFFICE
206 12th Avenue Road
P.O. Box 278
Nampa, Idaho 83653

☒ U.S. Mail
☐ Hand Delivery
☐ Federal Express
☐ Facsimile Transmission


Jon M. Bauman

ORIGINAL

RICHARD S. OWEN, ESQ. (ISB #2687)

206 Twelfth Avenue Road

Post Office Box 278

Nampa, Idaho 83653

Telephone: (208) 466-8700

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

**R & L CARRIERS SHARED
SERVICES, LLC,**

Employer,

and

ZURICH AMERICAN INS. CO.,

Surety,

Defendants.

I. C. No. 2008-011032

**CLAIMANT'S ANSWERS TO
DEFENDANTS' INTERROGATORIES
TO CLAIMANT**

TO: DEFENDANTS and their attorneys of record:

INTERROGATORY NO. 1: Please state the name, address and telephone number of each and every person known to you who has any knowledge of, or who purports to have any knowledge of, any of the facts of this case. By this Interrogatory, we seek the names, addresses and telephone numbers of all witnesses, or potential witnesses who have any knowledge of any facts pertinent to both damages and liability, and details as to their knowledge.

**CLAIMANT'S ANSWERS TO DEFENDANTS'
INTERROGATORIES TO CLAIMANT -- PG. 1**

EXHIBIT A

ANSWER TO INTERROGATORY NO. 1:

Claimant and Sophia Izaguirre
3517 Hermosa Ave.
Caldwell, Idaho 83605

Jimmy L. Crossland
14834 Radar Hills Dr.
Box Elder, SD 57719

Darrell & Lola Lankford
2184 Wildwood
Emmett, Idaho 83617
208-250-4749

Wayne James
1894 SE Sedgwick #104
Port Orchard, WA 98366

Corporal John McMahon
Department fo Public Safety
Utah Highway Patrol
20 West 700 North
Brigham City, UT 84302

Dr. Harold K. Thompson ✓
West Valley Medical Center
1717 Arlington Ave.
Caldwell, Idaho 83605

Dr. Kevin Chicoine
St. Al's Medical Group ✓
315 E. Elm, Ste. 100
Caldwell, Idaho 83605

Intermountain Medical Imaging ✓
2929 E. Magic View Dr.
Meridian, Idaho 83642

Dr. William Lindner
Dr. Mark S. Williams
6500 Emerald St.
Boise, Idaho 83704

Dr. Paul Collins
1520 W. State Street, Ste. 220
Boise, Idaho 83702

Caldwell Physical Therapy
1902 S. 10th Ave.
Caldwell, Idaho 83605

Peggy Wilson, PT, CEAS
STAARS
901 N. Curtis Rd., Ste. 204
Boise, Idaho 83706

Intermountain Physical Therapy
3110 E. Cleveland Blvd., Ste. A5
Caldwell, Idaho 83605

Teresa Ballard
847 Parkcentre Way, Ste. 7
Nampa, Idaho 83651

INTERROGATORY NO. 2: Please state the names, addresses and telephone numbers of all persons you intend to call as witnesses at the hearing of this case.

ANSWER TO INTERROGATORY NO. 2: Any of the individuals listed in Interrogatory No. 1, above may be called as a witness at the hearing of this case.

INTERROGATORY NO. 3: With respect to the person you intend to call at the hearing of this case, please state as precisely as possible, the general nature of the facts to which each will testify.

ANSWER TO INTERROGATORY NO. 3: Claimant and his wife Sophia Izaguirre will

**CLAIMANT'S ANSWERS TO DEFENDANTS'
INTERROGATORIES TO CLAIMANT -- PG. 3**

testify about his physical capabilities before and after the accident at issue herein.

Jimmy L. Crossland was the other individual involved in the accident.

Darrell & Lola Lankford and Wayne James witnessed the accident at issue herein and will testify to what they know.

Corporal John McMahon was the responding officer and will testify about his investigation and findings.

Claimant expects the doctors and physical therapists who have attended him since this accident to testify from their medical records and will address topics such as the history given to them by Claimant herein, the medical examinations which they conducted and the results thereof, any diagnostic tests which they recommended, any treatment which they offered and Claimant's response thereto, any progress which the Claimant made as a result of the medical treatments rendered, Claimant's permanent impairment and/or permanent restrictions as a result of the injury complained of, and Claimant's long and short term prognoses. For further details regarding these opinions, please see the medical records being attached contemporaneously herewith. If further records are obtained which detail further record this Answer will be supplemented.

Teresa Ballard will testify about the vocational assistance she provided to Claimant.

INTERROGATORY NO. 4: If you, your attorneys or any person, firm or corporation acting on your behalf has consulted with or engaged any experts in connection with this litigation, set forth from all facts pertaining to the experts including but not limited to the following: the name and address of each school or university where special education or training in this field was received; and the dates of attendance at each school or university and the name or description of each degree

received including the date received and the name of the school from which received.

As to any tests, analyses or examination conducted on any physical evidence relating to this litigation, please state on what dates they were conducted on any physical evidence relating to this litigation, please state on what dates they were conducted; the opinion of the expert or experts in detail including the conclusions and all information furnished to the expert and upon which his opinion was based. You may attach copies of any reports generated by the expert and material furnished to the expert in lieu of responding to this Interrogatory.

ANSWER TO INTERROGATORY NO. 4: Please see Interrogatory No. 1 and 3, above.

INTERROGATORY NO. 5: Please set forth in detail what each witness to your accident observed.

ANSWER TO INTERROGATORY NO. 5: Please see Answer to Interrogatory No. 3, above.

INTERROGATORY NO. 6: Set forth each and every fact relating to the occurrence of your accident or occupational disease.

ANSWER TO INTERROGATORY NO. 6: I was driving on I84 in Snowville, Utah when another semi truck pulled out in front of me and hit my semi truck causing it to rollover.

INTERROGATORY NO. 7: Set forth each and every fact surrounding the notice of injury or occupational disease which you allege was given to your employer.

ANSWER TO INTERROGATORY NO. 7: I placed a call to the accident line as required by my employer, Caleb the dispatcher and then notified the terminal manager, Fred Maxwell.

INTERROGATORY NO. 8: If you have earned money in any capacity as an employee,

self-employed or other since your date of injury, all data pertaining to your employment including the name and address of the business where you were so employed or received earnings, the dates employed, earnings received and hourly, weekly or monthly rate of pay.

ANSWER TO INTERROGATORY NO. 8: I am currently employed with Old Dominion Freightline as a truck driver. I started working part-time in July of 2009 and went full-time in March, 2010. I am paid .489 per mile.

INTERROGATORY NO. 9: If you have applied for employment with any individual, business or agency, or have filed for unemployment insurance compensation since the date of injury, set forth all facts pertaining to your application including the name and address of such individual, business agency or governmental agency, and the dates when you filed application for employment or unemployment, and if you have received unemployment, the dates during which unemployment was received.

ANSWER TO INTERROGATORY NO. 9: I applied with Estes Saia and Fed Ex.

INTERROGATORY NO. 10: If you have traveled outside the state of Idaho since your injury, please set forth all facts and circumstances surrounding each trip.

ANSWER TO INTERROGATORY NO. 10: I travel outside the State of Idaho to Oregon, Washington and Utah for my employment.

INTERROGATORY NO. 11: Set forth in detail any and all injuries you claim to have occurred as a result of the injury or occupational disease alleged in your Application for Hearing.

ANSWER TO INTERROGATORY NO. 11: I injured my neck and left knee.

INTERROGATORY NO. 12: Set forth the names and addresses of all providers of health

care, including hospitals, doctors, and chiropractors, from whom you have sought treatment for any reason, including the injury, since the date of injury.

ANSWER TO INTERROGATORY NO. 12: Please see Answer to Interrogatory No. 1, above for accident related treating physicians and therapists.

In addition,

INTERROGATORY NO. 13: Set forth the names and addresses of all providers of health care, including hospitals, doctors, and chiropractors, from whom you have sought treatment for any major accidents or illnesses from the date of birth until the date of the accident which is the subject matter of this litigation.

ANSWER TO INTERROGATORY NO. 13:

In 1995 I treated with Dr. Sid Garber, West Valley Medical Center, Dr. George Nicola, Dr. Betty Ball, Dr. Joe McCary and West Valley Physical Therapy for a low back and shoulder strain sustained while working for Larson Trucking when I was climbing down the ladder of a tanker and slipped and fell.

In 1996 I treated with West Valley Medical Center for epigastric pain.

In 1998 I treated with Dr. George Nicola and West Valley Medical Center for a left knee injury I sustained at a Mexican Restaurant in Utah when a heavy chair fell against my knee.

In 1999 I treated with West Valley Medical Center for right flank pain.

In 2000 I treated with West Valley Medical Center for right flank pain.

In 2002 I treated with Dr. Ben Terry at Saltzer QuickCare when I was carrying meat and some bone went through my leather gloves into my right middle finger while employed with

Innovative Data Solutions, LTD.

In 2002 I treated with West Valley Medical Center and Dr. Kevin Chicoine while working for Innovative Data Solutions, LTD when an employee of Con Agra sprayed the inside of my truck cab with a toxic chemical.

In August 2004 I treated with Saltzer Quickcare, Dr. Ben Terry and Dr. Miers Johnson for an injury to my right shoulder and cervical strain while working for Innovative Data Solutions, LTD when I was throwing bone into a trailer.

In 2004 I treated at West Valley Medical Center for a laceration to my left 2nd digit.

In 2007 I treated at West Valley Medical Center for left flank pain.

INTERROGATORY NO. 14: Set forth the names and addresses of all employers for whom you have worked, including self-employment, prior to the injury or occupational disease which is the subject matter of this litigation.

ANSWER TO INTERROGATORY NO. 14: I have been employed with the following:

From 2006 through 2009 I was employed with R&L Carriers as a combo driver. My rate of pay varied according to the line driven and additional work available.

In 2006 I was employed with DATS Trucking as a truck driver. I earned approximately \$14.00 an hour.

In 2005 I was employed with Motor West as a truck driver. I earned approximately .28 a mile.

In 2005 I was employed with Asphalt Alliance as a truck driver. I earned approximately .35 a mile.

**CLAIMANT'S ANSWERS TO DEFENDANTS'
INTERROGATORIES TO CLAIMANT – PG. 8**

From 2000 through 2005 I was employed with Innovative Data Solutions (Kar Services) as a truck driver. I earned approximately \$13.50 an hour.

I have been driving truck and have had my CDL for approximately 23 years and have worked for various trucking companies.

From 1997 through 1999 I was employed with Woodgrain Millwork as a laborer.

INTERROGATORY NO. 15: If you have ever been a member of the Armed Forces of the United States or any other country, set forth the pertinent information as to your military service, i.e., the branch of service, inclusive dates of service and your military service number.

ANSWER TO INTERROGATORY NO. 15: I have not been a member of the armed forces.

INTERROGATORY NO. 16: Set forth the residence addresses for each and every place you have lived since the date of injury or occupational disease which is the subject matter of this litigation.

ANSWER TO INTERROGATORY NO. 16: I have resided at 3517 Hermosa Ave., Caldwell, Idaho since the date of my injury.

INTERROGATORY NO. 17: Set forth each and every name or alias you have used since your date of birth through the present and the dates thereof.

ANSWER TO INTERROGATORY NO. 17: I have gone by Rubio Izaguirre, Rubio Izaguirre, Sr. and Rubio Izaguirre Mendoza.

INTERROGATORY NO. 18: If you claim to have sustained any permanent impairment or disability as a result of the injury which is the subject matter of this proceeding, please set forth

the name of the physician or other provider of health care who has so stated.

ANSWER TO INTERROGATORY NO. 18: Dr. Mark Williams issued me a 5% whole person impairment rating.

INTERROGATORY NO. 19: Set forth in detail the nature and extent of your formal education, vocational training or other educational and training background relative to your employability.

ANSWER TO INTERROGATORY NO. 19: I grew up in Mexico and never attended school.

INTERROGATORY NO. 20: Set forth the amount and source of your earnings for a period of one year preceding the date of injury which is the subject matter of this litigation.

ANSWER TO INTERROGATORY NO. 20: This information has been requested and this Answer will be supplemented.

INTERROGATORY NO. 21: If you have sustained any major injury or illness since the date of your accident or occupational disease which is the subject matter of this proceeding, set forth in detail all facts and circumstances surrounding such illness or injury.

ANSWER TO INTERROGATORY NO. 21: None.

INTERROGATORY NO. 22: If you have sustained any major injury or illness prior to the date of your accident or occupational disease which is the subject matter of this proceeding, set forth in detail all facts and circumstances surrounding such illness or injury.

ANSWER TO INTERROGATORY NO. 22: Please see Answer to Interrogatory No. 13, above.

**CLAIMANT'S ANSWERS TO DEFENDANTS'
INTERROGATORIES TO CLAIMANT -- PG. 10**

INTERROGATORY NO. 23: If you have received a settlement, commenced litigation or made claim in any manner for any injuries or illnesses which you have sustained throughout your life, regardless of whether such claim preceded or followed the injury or occupational disease which is the subject matter of this litigation, please set forth all the details and circumstances surrounding such settlement, litigation or claim.

ANSWER TO INTERROGATORY NO. 23: Please see attached records from the Idaho Industrial Commission.

INTERROGATORY NO. 24: Set forth in detail the nature of the complaints from which you suffer on the date of signing your answers to these Interrogatories and which you allege to be the result of the injury or occupational disease which is the subject matter of this litigation.

ANSWER TO INTERROGATORY NO. 24: I am unable to lift, bend and squat. I have no strength in my knee and have trouble with it locking up on me when I sit in the same position for a long period of time.

INTERROGATORY NO. 25: If you have ever been given an impairment rating or disability rating relative to any birth defect, injury or illness, regardless of whether it preceded or followed the injury or occupational disease which is the subject matter of this litigation, please set forth all details pertaining to the impairment rating, including the condition for which it was given, the source of the rating, i.e. physician who gave it, and the amount of the rating?

ANSWER TO INTERROGATORY NO. 25: I was given a 5% whole person impairment rating by Dr. Sid Garber for my December, 1995 injury to my left knee.

I was given a 1% whole person impairment for my August, 2004 injury to my right shoulder.

INTERROGATORY NO. 26: If you have any birth defect or have you had any illness or injury, regardless of whether such illnesses or injuries preceded or followed the accident or occupational disease which is the subject matter of this litigation, which you deem to be of a permanent nature, whether or not any physician or provider of health care has expressed any opinion about such birth defect, illness or injury, please set forth all factors pertaining to such conditions including those physicians who have treated you for it, and rendered any opinions pertaining to the permanency of the condition?

ANSWER TO INTERROGATORY NO. 26: Please see Answer to Interrogatory No. 25, above.

INTERROGATORY NO. 27: If any of your medical expenses or time loss which you claim to be caused by an industrial accident has been paid by an accident and health carrier, or by any other person or entity other than the Defendant employer or surety, please set forth all facts surrounding the payment including the following: The name, address and phone number of the surety, person or entity making such payment; whether or not such surety, person or entity has subrogation rights, name, address and phone number of the health care provider paid; the amount paid to the health care provider; and if time loss or disability payments were made, the amount of payments and the time for which payments were made.

ANSWER TO INTERROGATORY NO. 27: None at this time.

INTERROGATORY NO. 28: If you claim to have incurred temporary total disability in addition to that previously paid, please set forth all facts pertaining to it including the dates during which you claim such disability, and the name, address and phone number of the physician who

supports your claim for disability.

ANSWER TO INTERROGATORY NO. 28: Unknown at this time.

INTERROGATORY NO. 29: If you claim medical expenses in addition to those previously paid, please set forth all pertinent data pertaining to the expense including the name, address and phone number of the provider of health care, the dates the services were provided, the amount of the bill incurred, and the reason for the treatment for which the expense was rendered.

ANSWER TO INTERROGATORY NO. 29: I contend that I am entitled to the surgery which Dr. William Lindner recommended in March of 2009.

INTERROGATORY NO. 30: If you claiming an unreasonable denial of benefits and attorney fees therefore pursuant to I.C. Section 72-804, please set forth each and every fact supporting your claim.

ANSWER TO INTERROGATORY NO. 30: I am not claiming attorney fees at this time.

INTERROGATORY NO. 31: Set forth the dates when counsel for Claimant, or any representatives on behalf of counsel for Claimant have had communications, written or oral, with any of Claimant's treating physicians.

ANSWER TO INTERROGATORY NO. 31: Please see attached medical request letters.

INTERROGATORY NO. 32: If you are subject to any Order for Child Support for which a lien might be filed by any state agency upon any revenues due you from the employer, please state all facts and circumstances surrounding the Child Support Order, including but not limited to the state in which the Order was entered, the Court in which the Order was entered, the amount of the payments, the payee of the payments, and any other pertinent information.

ANSWER TO INTERROGATORY NO. 32: None.

INTERROGATORY NO. 33: If you have proceeding pending, or a claim pending against any other employer, or any other individual, for any physical condition which you allege causes you disability or restriction, set forth the name and address of the parties, the tribunal in which it is pending, and its current status.

ANSWER TO INTERROGATORY NO. 33: None.

INTERROGATORY NO. 34: Set forth the date(s) of any Social Security Disability application(s) and the outcome or status thereof.

ANSWER TO INTERROGATORY NO. 34: I have not applied for Social Security Disability.

INTERROGATORY NO. 35: If you have applied for Social Security Disability and been denied, do you plan to appeal or reapply?

ANSWER TO INTERROGATORY NO. 35: Not applicable.

INTERROGATORY NO. 36: Are you eligible for Medicare benefits?

ANSWER TO INTERROGATORY NO. 36: No.

INTERROGATORY NO. 37: If you are not currently eligible for Medicare benefits, do you anticipate being eligible for Medicare benefits within the next 30 months?

ANSWER TO INTERROGATORY NO. 37: No.

DATED This 16 day of December, 2010.

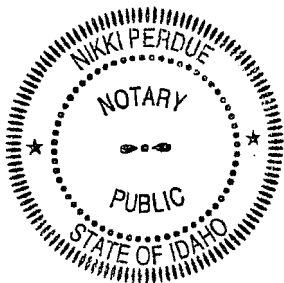
Rubio Izaguirre

Rubio Izaguirre, Claimant

STATE OF IDAHO)
 : ss.
County of Canyon)

On this 16th day of December, 2010, before me a Notary Public in and for said State, personally appeared RUBIO IZAGUIRRE, known to me to be the person whose name is subscribed in the above and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in this certificate first above written.



Nikki Perdue

Notary Public for Idaho

Residing at Caldwell, Id.

My Comm. Expires: 4/26/11

REVIEWED AND APPROVED This 16 day of December, 2010.

By: Richard S. Owen

Richard S. Owen

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 16 day of December, 2010, a true and correct copy of the foregoing was mailed, U.S. Postage prepaid, to:

Alan R. Gardner
P.O. Box 2528
Boise, Idaho 83701

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.



Richard S. Owen

RELEASE OF ALL CLAIMS AND INDEMNITY AGREEMENT

The undersigned, **RUBIO S. IZAGUIRRE SR.** and **JUANA SOFIA IZAGUIRRE**, individually, and as husband and wife, for the sole consideration of **TWO HUNDRED THOUSAND AND 00/100 DOLLARS (\$200,000.00)**, receipt of which is hereby acknowledged, do hereby on behalf of themselves, and for their heirs, executors, administrators, successors, estates, representatives, assigns, employees or agents, if any, and any and all persons or entities who may have an interest herein, (hereinafter individually and collectively referred to as "Releasors"), release, acquit and forever discharge **AMERI-CO CARRIERS, INC.**, a Nebraska Corporation, and **JIMMY L. CROSSLAND**, individually and as an employee of Ameri-Co Carriers, Inc., and each and all of their respective agents, employees, principals, officers, members, shareholders, parent corporations, subsidiaries, successors, directors, assigns, and insurers, including but not limited to **HARCO NATIONAL INSURANCE COMPANY**, (hereinafter individually and collectively referred to as "Releasees") of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of services, expense, attorney fees and compensation whatsoever which the Releasors now have or which may hereafter accrue on account of or in any way pertaining to any and all injuries and damage, and the consequences thereof, resulting, arising from or which allegedly have arisen from that certain accident, casualty or event which occurred on Interstate 84 in Box Elder County, Utah, on or about February 28, 2008, wherein a vehicle owned by Ameri-Co and operated by Jimmy L. Crossland collided with a vehicle operated by Rubio S. Izaguirre causing injuries and alleged damages to Releasees.

As further consideration for this Release of All Claims and Indemnity Agreement, Releasors promise and covenant to satisfy and pay any and all medical providers, lien holders, insurers, and subrogated interests, or rights of any person, company or entity which has or may claim a right to reimbursement or payment for any medical treatment, disability, or property damage, or damage of any kind of Releasees arising from or caused by the accident or incident described herein, including but not limited to the Idaho State Insurance Fund or any other worker's compensation, and Releasors further agree to indemnify, defend, and hold Releasees harmless against any and all such claims, loss, damage or expense, including costs and reasonable attorney fees, which may be asserted against or incurred by Releasees if Releasors fail to satisfy and pay providers or subrogated interests as promised herein.

This Release of All Claims and Indemnity Agreement is in all respects intended to and shall be construed to be a general release of all claims of Releasors against Releasees arising from the accident or incident described herein. It is intended and shall be a full and final release and discharge of Releasees, regardless of any injury, damage or right, whether known or unknown, by Releasors.

This Release of All Claims and Indemnity Agreement is entered into voluntarily by Releasors with a full understanding of any and all claims, rights, injuries or damage which they may now claim or in the future may claim to exist or be caused by the

incidents described above. Releasors hereby declare and represent that the damages allegedly sustained are or may be permanent and progressive and recovery therefrom is uncertain and indefinite, and in making this release and entering into this agreement, it is understood and agreed that Releasors rely wholly upon Releasors' judgment, belief and knowledge of the nature, extent and duration of said alleged damages, and is made without reliance upon any statement or representation of the Releasees or their representatives. Releasors have consulted with their attorneys, namely D. Scott Summer, in all material respects regarding the settlement of Releasors' claims and this Release of All Claims and Indemnity Agreement.

This settlement is a compromise of a doubtful and disputed claim, and the payment made is not to be construed as an admission of liability by Releasees, and Releasees deny liability therefore and intend merely to avoid litigation and buy their peace.

No promise, inducement or agreement not herein expressed has been made to Releasors and this Release of All Claims and Indemnity Agreement contains the entire agreement between the parties hereto, and the terms of this Release are contractual and not mere recitals. This Release of All Claims and Indemnity Agreement is entered into in the State of Idaho and shall be construed in accordance with its laws. This Release of All Claims and Indemnity Agreement shall be valid in all States, including but not limited to, the State of Idaho and the State of Utah.

Releasees agree to pay the mediator's fee for the mediation conducted on October 15, 2009.

THE UNDERSIGNED HAVE READ THE FOREGOING AND FULLY UNDERSTAND IT.

///

///

Dated this 22 day of October, 2009.

RELEASOR:

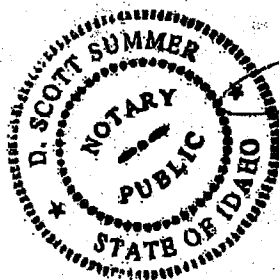
Rubio S. Izaguirre
RUBIO S. IZAGUIRRE SR.

STATE OF IDAHO

County of Canyon) ss.

On this 22 day of October, 2009, before me, the undersigned, a notary public in and for said county and state, personally appeared RUBIO S. IZAGUIRRE SR., known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



[Signature]
NOTARY PUBLIC for IDAHO
Residing at ampa, Idaho
My Comm. Exp. 8-16-2014

RELEASE OF ALL CLAIMS AND INDEMNITY AGREEMENT -- Page 3 of 4

Dated this 22 day of October, 2009.

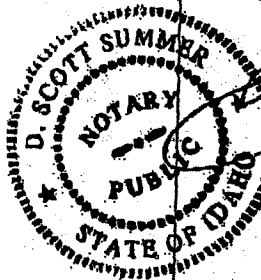
RELEASOR

Juana Sofia Izaguirre
JUANA SOFIA IZAGUIRRE

STATE OF IDAHO)
County of Canyon) ss.

On this 22 day of October, 2009, before me, the undersigned, a notary public in and for said county and state, personally appeared JUANA SOFIA IZAGUIRRE, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



[Signature]
NOTARY PUBLIC for IDAHO
Residing at Boise, Idaho
My Comm. Exp. 8-16-2014

APPROVED AS TO FORM:

D. SCOTT SUMMER, PLLC

BY [Signature]

D. Scott Summer
Attorney for Releasors

D. SCOTT SUMMER, PLLC

ATTORNEY AT LAW

823 SPECHT AVE., SUITE "D"
CALDWELL, IDAHO 83605

PO BOX 1095
CALDWELL, ID 83605

TELEPHONE: 208.455.8602
FACSIMILE: 208.455.8600

*Licensed in Idaho & Oregon

November 13, 2009

Rubio Izaguirre, Sr.
Juana Sofia Izaguirre
3517 Hermosa Ave
Caldwell, ID 83605

ORIGINAL

Re: Settlement of your personal injury and loss of consortium claims, and loss of consortium claims, *however, your Worker's Compensation Claims, Human Rights / Wrongful Termination & possible wrongful denial of disability benefits claims remain open.*

Dear Mr. and Mrs. Izaguirre:

At your request, we have settled your personal injury claim and loss of consortium claim for a total of \$200,000, with \$100,000.00 attributed to Rubio and \$100,000.00 attributable to Sofia for her loss of consortium claims. The signing of this release ends, once and for all, any claims either of you may have had against Amer-Co Carriers, Jimmy L. Crossland and/or any of its/his insurers for this cause of action. However, as noted above, your Worker's Compensation, Human Rights, Wrongful Termination and possible wrongful denial of disability benefits claims remain open.

The following represents an initial reconciliation of fees, costs, and other distributions, currently to be held in Trust until the final payouts are determined, in accordance with the Attorney/Client Contract entered into between "Client" and "Attorney." All other undisputed monies are to be distributed to you and each of you at this time.

TOTAL GROSS AGGREGATE SETTLEMENT: \$ 200,000.00

\$100,000.00 attributed to Rubio Izaguirre for his direct personal injury claims.

(Remaining open are your Worker's Compensation Claims, Human Rights Claims, Wrongful Termination Claims and a possible wrongful denial of Disability Benefits claim.)

\$100,000.00 attributed to Sofia Izaguirre for her personal loss of consortium claims.

Less:

ATTORNEYS' FEES: \$ 70,000.00

COSTS ADVANCED: \$ 73.61

(Plus \$233.99 already paid, for a total of \$307.60)

WC SUBRO (to be held in trust until resolved)..... \$ 43,518.65

50% of LAW CASH ASSIGNMENT \$ 13,549.26

(\$6,774.63 from Rubio/\$6,774.63 from Sofia)

EXHIBIT C

AG001078

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Rubio Izaguirre, Sr. and Juana Sofia Izaguirre
Page 2 of 2
November 13, 2009

NET SETTLEMENT TO RUBIO: \$ 14,633.11

NET SETTLEMENT TO SOFIA: \$ 58,225.37

The undersigned, by their signatures hereto, acknowledge and accept the foregoing reconciliation as a complete and final settlement in accordance with the terms of the aforesaid agreement, excepting the workers compensation and Law cash monies to be held in trust until those final amounts are determined, upon that determination, the remainder of monies held in trust will be distributed to the Plaintiffs in proportion to their individual shares therein, and a complete and final settlement of any and all claims of either against the other, including but not limited to, those arising out of the performance of the said agreement.

Client acknowledges that this settlement is entered into at client's request and that this settlement ends, once and for all, client's claim against the opposing party. However, as noted above, Plaintiff Rubio has remaining open workers compensation claims, wrongful termination claims and a possible wrongful denial of disability benefits claim.

The client further understands there may be circumstances under which client is obligated to repay a portion of client's recovery to a third person such as a health insurer. Our fee agreement does not include advising you or representing you with regard to claims of third persons to your settlement money.

The settlement of this case is made with client's consent and approval. Client acknowledges receiving a copy of this letter, and client hereby states that it is in accordance with client's understanding and client does hereby approve of the entire closing of this portion of her claims and of all disbursements made therein.

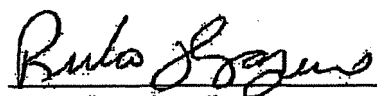
Client hereby represents and warrants that any unpaid medical or other related expenses not hereinabove mentioned, as well as all other expenses in connection with this claim, are client's responsibility.

Our office will dispose of your file in its entirety after two years from the date of this letter, as is our common traditional practice.

DATED This 13 day of November, 2009.


D. Scott Summer

DATED This 13 day of November, 2009.


Rubio Izaguirre, Sr.


Juana Sofia Izaguirre

RICHARD S. OWEN, ESQ. (ISB #2687)

206 Twelfth Avenue Road

Post Office Box 278

Nampa, Idaho 83653

Telephone: (208) 466-8700

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

**R&L CARRIERS SHARED
SERVICES, LLC,**

Employer,

and

ZURICH AMERICAN INS. CO.,

Surety,

Defendants.

I. C. No. 2008-011032

**CLAIMANT'S MEMORANDUM
BRIEF IN OPPOSITION TO MOTION
FOR STAY**

COMES NOW Claimant, by and through his attorney of record, hereby files this Memorandum Brief in Opposition of the Defendants' Motion for Stay and its Motion to determine a novel issue of law.

STATEMENT OF THE CASE

Defendants have accurately set out the status of the case at this point. Claimant had a third

**CLAIMANT'S MEMORANDUM BRIEF IN OPPOSITION
TO MOTION FOR STAY - PG. 1**

party case which was settled by a previous attorney of record and the monies disbursed. As set forth in the Exhibits A and B to the Defendants' Memorandum Brief, the Claimant and his wife settled his case as against the adverse third party carrier for a total of \$200,000.00. This settlement was attributed to both the husband and wife; the wife asserting a claim for loss of consortium.

The Defendants now seek to characterize that settlement as one against which they can exercise their subrogated rights, regardless of the nature of their recovery or the fact that the Claimant's wife was entitled to at least part of that recovery.

Secondly, the Defendants evidentially request that the Industrial Commission go behind settlement documents as between Claimant, his wife, and the third party to attribute the settlement achieved by the Claimant from the third party in a manner more favorable to Defendants.

ARGUMENT

1. Some of the Settlement is the Wife's Separate Property

Defendants cite to the case of *Cook v. Cook*, 102 Idaho 651, 637 P.2d 799 (1981), for the proposition that benefits obtained through a worker's compensation case are presumed to be community property.

Unfortunately, the citation of this case and its legal proposition do not assist the Industrial Commission herein. At issue in this case are not benefits which were obtained through a worker's compensation case; at issue herein are benefits obtained in a personal injury recovery. The characterization of these benefits depends upon the nature of their recovery and the basis for that recovery. In the seminal case of *Rogers v. Yellowstone Park Company*, 97 Idaho 14, 539 P.2d 566 (1974), the Idaho Supreme Court was concerned with the thorny issue of whether or not a wife could

maintain a lawsuit against the husband for negligence. The Court found that the determination of this issue rested on at least in part, on whether or not the recovery would be community property and how that law affected the wife's ability to recover as against the husband.

After deciding that there was no public policy reason to prevent a wife from maintaining a cause of action for negligence against the husband in the context of the case, (automobile accident), the Court continued by noting that the wife's recovery would be partially community property and partially her own separate property depending upon the nature of the recovery obtained.

It is our conclusion that the Washington Supreme Court has established a workable rule concerning damages in this type of case, an action for personal injuries sustained by the wife. Therefore it is the conclusion of this court that appellant in this action is entitled to pursue her remedy for damages arising out of the accident alleged notwithstanding that she has named her husband as a party defendant. Appellant seeks recovery of special damages, including established future specials. She also seeks general damages for loss of future earnings and also general damages as compensation for pain and suffering. Appellant is entitled to recover her special damage, including established future specials, as these are actual out of pocket expenses which are a community liability. And the fact her spouse would be relieved of his financial burden is outweighed by the fact such damages are strictly compensatory in nature inuring to the benefit of the injured spouse. General damages for loss of future earnings which would be community property would be recoverable only in the fraction of one-half as the separate property of the injured spouse, and general damages for pain and suffering and emotional distress would be fully recoverable as the injured spouse's separate property.

(See, *Rogers, supra*, at 539 P.2d 572) (Emphasis Added)

In *Cook v. Cook, supra*, the Supreme Court noted that the classification of property as separate or community depends upon whether or not the right to be vindicated is personal to one spouse alone or whether or not the right to be vindicated is payable from community proceeds or as

a community liability.

The classification of property as separate or community is controlled initially by I.C. Section 39-903 and Section 39-906. Applying those sections, the Plaintiff argues that when a right to receive worker's compensation becomes vested due to the occurrence of a work-related injury during marriage, the right to benefits is wholly community property because it is "property acquired after marriage," but not acquired by "gift, bequest, devise or decent ... or with the proceeds of separate property." However such an argument places to strict a construction upon the word "acquired." Where property, or the right to receive property, is acquired during marriage as compensation for some right personal to one spouse alone, that property takes its character from the right violated and is a separate property of that injured spouse. *Jurek v. Jurek* 124 Ariz. 596, 606 P.2d 812, 818 (1980); *Fredrickson & Watson Constr. Co., v. Boyd*, 102 P.2d 627, 629 (Nev. 1940). This Court has recently recognized that rule by holding the pain and suffering component of a tort recovery for a personal injury to be the separate property of the injured spouse. *Rogers v. Yellowstone Park Co., supra*. By the same token, the "acquired" should not be read over broadly to require that every award of workman's compensation be deemed community property in total simply because the injury upon which the benefits are premised occurred during marriage.

(See, *Cook, supra* at 637 P.2d at 653.) (Emphasis Added)

Claimant in this case contends that even though the right to make a claim for loss of consortium is a derivative claim and flows from the fact of the injury to Claimant in this matter, Claimant contends that the recovery of his wife in this third party settlement is the property of his wife because it is based upon the wife's loss of services, society, companionship and other elements of the marital relationship suffered personally by the wife as a result of the injury to the Claimant.

Under the holding of *Rogers v. Yellowstone, supra*, and *Cook v. Cook, supra*, Claimant contends that a loss of consortium recovery such as that obtained by the wife in this case is separate property and beyond the reach of any subrogated interest of the Surety herein.

**CLAIMANT'S MEMORANDUM BRIEF IN OPPOSITION
TO MOTION FOR STAY - PG. 4**

In addition, Claimant contends that other elements of the settlement achieved by the Claimant and his wife in this matter may be partially beyond the reach of the subrogated interest of the Defendant Surety in this matter. Under the rationale of the *Yellowstone* case, *supra*, if the Claimant's settlement includes a recovery for future loss of earnings, future medical expense, and future pain and suffering or other benefits which may be classified as community property, belonging half to the Claimant and half to the Claimant's wife, then Claimant contends that these benefits may also be beyond the reach of the Surety herein as they are the property of the wife, at least partially.

Claimant requests that the Industrial Commission allow Claimant additional briefing to fully outline the law in this matter if the Industrial Commission decides that it has the jurisdiction and the desire to delve into this issue more deeply.

THE SCOPE OF THE INDUSTRIAL COMMISSIONS POWER TO INTERVENE

Claimant has genuine and basic questions about the scope of authority of the Industrial Commission herein to intervene in this matter and make determinations about the extent of the Defendants' subrogated interest especially inasmuch as it involves inquires in to the attorney's fees charged by Claimant's previous attorney and, the extent of the subrogated interest in that part of Claimant's settlement which may constitute the separate property of Claimant's wife.

1. Attorney's Fees

As noted by an Exhibit attached to the Defendants' Brief, in the letter of D. Scott Summer, Claimant's previous attorney, it appears that Claimant was charged an attorney's fee in the amount of \$70,000.00 from the settlement achieved herein or an amount equal to thirty-five percent (35%) of the \$200,000.00 settlement. Further, it appears that there is a dispute between Surety and

Claimant's previous attorney about whether or not Surety would honor this attorney's fee and would assume its proportionate share thereof pursuant to Idaho Code 72-223(4).

Claimant contends that neither Surety nor the Industrial Commission has the jurisdiction to refuse to honor this fee and that this is a contractual matter between the Claimant and his previous attorney of record.

It is to be remembered that the Industrial Commission previously attempted to become involved in an attorney's fee issue in a third party case as between a Claimant and the Claimant's attorney only to be informed by the Supreme Court that it had no jurisdiction to do so. In the sad case of *Leanne Cheung v. Raymundo Pena*, 143 Idaho 30, 137 P.3d 417 (2006), the Industrial Commission had intervened in a case between a Claimant and the Claimant's lawyer in a situation where the Claimant had a third party case and a worker's compensation case both handled by the same attorney.

In the Industrial Commission's proceedings, the Industrial Commission found that the Claimant's attorney had overcharged the Claimant in the third party case and also in the worker's compensation case ordering the Claimant attorney to refund the Claimant a substantial amount of money.

On appeal, the Idaho Supreme Court affirmed the Industrial Commission with regard to the attorney's fees charged in the worker's compensation case. However, the Idaho Supreme Court noted that the Industrial Commission did not have jurisdiction to force the Claimant's attorney to refund any monies charged in the third party case and reversed this part of the Industrial Commission's decision. The Supreme Court noted in support of this decision as follows:

The Industrial Commission is empowered by statute to issue rules and regulations necessary to accomplish the purposes of the Worker's Compensation Act. (Citations omitted). ... As the Commission's authority is a creation of statute, the Commission "may only act pursuant to an enumerated power." *Curr*, 124 Idaho at 691, 864 P.2d at 317. The Industrial Commission's mandate over worker's compensation cases is limited to those claims brought by worker's compensation claimants against employers or an employer's surety. *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 134, 106 P.3d 455, 460 (2005).

In this case, the Industrial Commission, it is submitted, has no jurisdiction to relieve the Surety of accepting its proportionate share of liability for the fee charged by the Claimant's previous attorney pursuant to I.C. 72-223. This calculation must be a part of the subrogated interest both past, present and future of Surety herein. In other words, Claimant contends that the thirty-five percent (35%) fee charged by Claimant's attorney below must be honored both in terms of repayment of the Surety of the subrogated interest which it possessed at the time of settlement and in relation to any future subrogated interest which the Industrial Commission may find in this case.

2. The Extent of Claim for Claimant's Wife, Loss of Consortium

As noted in Defendants' Brief, Defendants have noted that all of the recovery in this case is attributable to the Claimant itself and that even if the Industrial Commission herein attributes part of that settlement to the wife of Claimant, all those proceeds are community property, thereby allowing Defendant to exercise its subrogated rights against the entire settlement achieved by Claimant and his wife.

As noted in the prior section, Claimant contends that the wife's share of the settlement including her claim for loss of consortium, is her own separate property and is not something that can be attached, reached or taken away by the Defendant Surety as part of its subrogated rights.

If the Industrial Commission agrees with this legal argument, then the Industrial Commission is left with a question of whether or not the apportionment or attribution of the \$200,000.00 settlement made by Claimant's previous attorney as between Claimant and his wife is appropriate. As noted, Defendants claim that it is not appropriate. Claimant contends that it is appropriate.

If the Industrial Commission finds, as a matter of law, that the wife's separate property cannot be reached by Defendants through their subrogation rights pursuant to Idaho Code 72-223, then the Industrial Commission must decide how much of the settlement is factually and legally, the sole property of the wife herein.

Claimant recognizes that prior Industrial Commission cases have assumed jurisdiction to decide similar questions. In the case of *Davis v. Wayne's Transmission*, 94-881861, 1999 IIC 1014 (1999), the Industrial Commission was concerned about a third party settlement which had been settled without any determination as to whether or not the employer was comparatively liable.

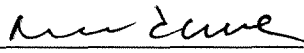
Based upon a dispute between the settling Claimant that the employer with regard to the employers degree of fault, the Industrial Commission received briefing and determined that because the determination of the comparative fault as between the employer and the employee involved the administration of Idaho Code 72-223, it would assume jurisdiction to determine the comparative fault issue. After reviewing a California case on point, the Industrial Commission determined that the Commission had jurisdiction pursuant to Idaho Code Section 72-201, 72-211, 72-707, and 72-223 to hear the alleged issue of alleged comparative fault of the Defendant employer under the facts of this case where that issue had not been resolved in the trial court and had not been agreed upon by the parties. (*See*, attached).

In view of this decision, Claimant assumes that the Industrial Commission has jurisdiction to hear the issue of how much of Claimant's settlement should properly be apportioned to the wife as her sole and separate property and suggests that this issue be the subject of the Claimant's hearing now set to commence on June 3, 2011.

Claimant contends that an evidentiary hearing on this issue is required so that the Commission or its designated Referee can hear evidence as to the extent of injuries suffered by the wife in this matter and to enable the finder of fact to make a decision about the extent of injury suffered by the wife and the value thereof in this matter.

RESPECTFULLY SUBMITTED.

DATED This 1 day of April, 2011.

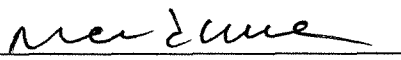
By: 
Richard S. Owen

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1 day of April, 2011, I mailed a true and correct copy of the foregoing instrument, postage prepaid, to the following:

Jon M. Bauman
P.O. Box 1539
Boise, Idaho 83701

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.


Richard S. Owen

**CLAIMANT'S MEMORANDUM BRIEF IN OPPOSITION
TO MOTION FOR STAY - PG. 9**

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Davis, Kevin J.
Wayne's Transmission
Idaho State Insurance Fund
09/03/1999
94-881861 - 1999 IIC 1014

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

INTRODUCTION

The Industrial Commission, pursuant to Idaho Code Section 72-506, assigned the above-entitled case to Referee Peggy McMahon who held a telephone conference on May 17, 1999, regarding procedural matters. Craig R. Jorgenson of Pocatello, Idaho, represented Claimant. James A. Ford of Boise, Idaho, represented Defendants Employer and Surety. Referee McMahon set the matter for hearing the week of October 4, 1999. Should the Commission assume **jurisdiction** on the questions relating to the issue of concurrent **comparative** negligence, that matter will be heard as well as the issues of the extent of impairment and disability benefits. However, Referee McMahon requested that the question of the Commission's subject matter **jurisdiction** over the issue of concurrent negligence be briefed prior to hearing. The final brief having been received on August 13, 1999, the matter is ready for decision.

CONTENTIONS OF THE PARTIES AND ISSUE

Claimant contends and Defendants deny that the Commission has exclusive **jurisdiction** as a "question arising under [workers' compensation] law" to hear the issue of alleged **comparative** negligence of Defendant Employer as against a third party and its related issues. That is the sole issue presented to the Commission at this time.

EVIDENCE CONSIDERED

The evidence considered is the Commission's legal file in the above-entitled matter. After having fully considered the above evidence and the briefs of the parties, Referee Peggy McMahon submits the following Findings of Fact and Conclusions of Law for review by the Commission.

FINDINGS OF FACT

1. Kevin Davis, Claimant, suffered various fractures in his spine and upper and lower extremities that allegedly arose out of and in the course of his employment with Wayne's Transmission on July 18, 1994, after a tire that he had inflated exploded.
2. Claimant first filed a third-party action (K. Davis v. Bridgestone/Firestone, Inc., CIV97-017-E-BLW) in the United States District Court, District of Idaho.
3. Claimant next filed his Workers' Compensation Complaint on November 19, 1998, listing as an issue, "The employer/surety's entitlement to subrogation-reimbursement out of settlement proceeds from the third-party suit." According to the representations of counsel, the third party action was settled with the consent of Employer/Surety and the parties agreed that issues regarding subrogation and future workers' compensation benefits would be left open. Claimant's Reply Brief, p. 5. Because the issue of Employer's comparative negligence was not litigated in U.S. District Court, Claimant now requests that he be allowed to litigate that matter before the Commission.

ANALYSIS AND CONCLUSIONS OF LAW

Jurisdiction cannot be conferred contrary to statute, even by stipulation or agreement of the parties. See, Knight v. Younkin et al., 61 Idaho 612, 105 P.2d 456 (1940); Banbury v. Brailsford, 66 Idaho 262, 158 P.2d 826 (1945). Thus, even though the parties may have agreed during the third-party action in federal court that the issues related to **comparative negligence** will be litigated before the Commission, such an agreement is not binding on the Commission. Nevertheless, the Commission has **jurisdiction** to determine whether it may exercise subject matter **jurisdiction**. See Brooks v. Standard Fire Ins. Co., 117 Idaho 1066, 793 P.2d 1238 (1990).

Statutory and case law point to the Commission as the forum to exercise **jurisdiction** where the matter of **comparative negligence** has not been adjudicated in civil court. Idaho Code Section 72-201¹ and

¹ That section provides:

72-201. Declaration of police power. -- The common law system governing the remedy of workmen against employers for injuries received and occupational diseases contracted in industrial and public work is inconsistent with modern industrial conditions. The welfare of the state depends upon its industries and even more upon the welfare of its wage workers. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this law provided.

72-211² vest exclusive **jurisdiction** in the Industrial Commission over claims for injuries arising out of and in the course of employment. *Henderson v. State*, 110 Idaho 308, 715 P.2d 978, cert. denied, 477 U.S. 907, 106 S.Ct. 3282 (1986). Under Idaho Code Section 72-707³ all “questions arising under this [workers’ compensation] law, . . . except as otherwise provided, shall be determined by the Commission.”

Defendants argue that the issue of **comparative** negligence is not a question arising “under this law” because a negligence claim is based on common law and Idaho statutory schemes outside the realm of workers’ compensation law. They contend that workers’ compensation laws focus on an injured worker’s entitlement to benefits and the nature and extent of those benefits and that negligence claims must be brought in district court. Claimant’s counter arguments are three-fold. First, the adjudication of **comparative** negligence (i.e., whether a negligent employer may be barred from subrogation recovery) is a subrogation matter under Idaho Code Section 72-223(3) and 72-223(4). Second, *Van Tine I*, *infra*, and *Van Tine II*, *infra*, and Idaho Code Section 72-707⁴ unquestionably vest the Commission with **jurisdiction** to hear subrogation matters. Third, the difficulties arising from **not** hearing this question before the Commission essentially create more problems than are necessary or reasonable.

² That section provides:

72-211. Exclusiveness of employee’s remedy. -- Subject to the provisions of section 72-223, the rights and remedies herein granted to an employee on account of an injury or occupational disease for which he is entitled to compensation under this law shall exclude all other rights and remedies of the employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or disease.

³ That section provides:

72-707. Commission has jurisdiction of disputes. -- All questions arising under this law, if not settled by agreement or stipulation of the interested parties with the approval of the commission, except as otherwise herein provided, shall be determined by the commission.

⁴ That section provides:

72-707. Commission has jurisdiction of disputes. -- All questions arising under this law, if not settled by agreement or stipulation of the interested parties with the approval of the commission, except as otherwise herein provided, shall be determined by the commission.

Under Idaho Code Section 72-223(3)⁵ an employer who has paid benefits to an employee is subrogated to the rights of that employee against a third party and may seek reimbursement of workers' compensation benefits from a third-party recovery. The reason for allowing such reimbursement is to prevent an employee from obtaining a double recovery. *Shields v. Wyeth*, 95 Idaho 572, 513 P.2d 404 (1973). However, there is an exception to the general rule requiring reimbursement of employer benefit payments. The Idaho Supreme Court in *Liberty Mutual Insurance Company v. Adams*, 91 Idaho 151, 417 P.2d 417 (1966), held that an employer whose negligence contributed to the injury of an employee was not entitled to reimbursement from the employee for workers' compensation payments made to the employee who had recovered sums from a third-party tortfeasor. The rationale behind denying benefits to a negligent employer is that it is contrary to the policy of the law for an employer (or the employer's surety) to profit from its own wrongdoing. *Id.*

⁵ Idaho Code Section 72-223 provides:

72-223. Third party liability. -- (1) *the right to compensation under this law shall not be affected by the fact that the injury, occupational disease or death is caused under circumstances creating in some person other than the employer a legal liability to pay damages therefor, such person so liable being referred to as the third party. Such third party shall not include those employers described in section 72-216, Idaho Code, having under them contractors or subcontractors who have in fact complied with the provisions of section 72-301, Idaho Code; nor include the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed.*

(2) *Action may be instituted against such third party by the employee or in event compensation has been claimed and awarded, by the employee and employer jointly, in the employee's name or, if the employee refuses to participate in such action, by the employer in the employee's name.*

(3) *If compensation has been claimed and awarded, the employer having paid such compensation or having become liable therefor, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer's compensation liability.*

(4) *On any recovery by the employee against a third party, the employer shall pay or have deducted from his subrogated portion thereof, a proportionate share of the cost and attorney's fees incurred by the employee in obtaining such recovery.*

(5) *If the amount recovered from the third party exceeds the amount of the subrogated portion payable to the employer for past compensation benefits paid, then to the extent the employer has a future subrogated interest in that portion of the third party recovery paid to the employee, the employer shall receive a credit against its future liability for compensation benefits. Such credit shall apply as future compensation benefits become payable, and the employer shall reimburse the employee for the proportionate share of attorney's fees and costs paid by the employee in obtaining that portion of the third party recovery corresponding to the credit claimed. The employer shall not be required to pay such attorney's fees and costs related to the future credit prior to the time the credit is claimed. However, the employer and employee may agree to different terms if approved by the industrial commission.*

(6) *If death results from the injury or occupational disease and if the employee leaves no dependents entitled to benefits under this law, the surety shall have a right of action against the third party for recovery of income benefits, reasonable expenses of medical and related services and burial expense actually paid by the surety and for recovery of amounts paid into the industrial special indemnity account pursuant to section 72-420, Idaho Code, and such right of action shall be in addition to any cause of action of the heirs or personal representatives of the deceased.*

(7) *All rights and restrictions herein granted to the employer have previously been intended to be, and are hereby expressly granted to the industrial special indemnity account.*

Typically, an employer/surety pays an employee workers' compensation benefits. The worker files a claim in district court; the third party may then sue the employer to determine whether the employer was negligent. If the employer is found to be concurrently negligent, the employer is denied reimbursement and the third party is credited for the amount of workers' compensation benefits paid. If the employer is not found to be negligent, the employer obtains reimbursement for the workers' compensation benefits paid. See *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 678 P.2d 33 (1983). Here, however, there was no adjudication of or agreement regarding Employer's negligence. Whether the Commission has subject matter **jurisdiction** to hear the question of an employer's negligence is a case of first impression in Idaho.

The case of *Van Tine v. Idaho State Insurance Fund*, 126 Idaho 688, 889 P.2d 717 (1994)(*Van Tine I*) is instructive. In that case, Van Tine filed both a workers' compensation claim as well as a third-party claim. He reached a settlement with the third party and the SIF claimed its subrogated interest in that third party settlement. Van Tine then filed a claim in district court alleging that the SIF had waived its subrogation rights to proceeds of the third party tort recovery. The Idaho Supreme Court held that subrogation rights to proceeds of a third-party settlement arise under Idaho Code Section 72-223(3).

*Whether SIF has lost this subrogation right for **any** reason affects SIF's subrogation rights under I.C. Section 72-223(3), and is therefore, a question within the exclusive jurisdiction of the Commission over which the trial court has no subject matter jurisdiction.*

Van Tine I, at 690 (emphasis added).

Following *Van Tine I*, the Court issued *Idaho State Ins. Fund v. Turner*, 130 Idaho 190, 938 P.2d 1228 (1997). There, Turner sued the negligent third party uninsured driver who caused his industrial accident. Claimant then filed an uninsured motorist claim against his employer's uninsured motorist policy. During arbitration he was awarded money less an offset which represented the amount previously paid by SIF to him. SIF then filed in district court requesting entitlement to reimbursement for the amount of workers' compensation benefits paid. The district court determined the SIF did not have a right to subrogation. Relying on *Van Tine I*, the Idaho Supreme Court held that the SIF's subrogation right to proceeds of the third party settlement arose under Idaho Code Section 72-223(3) and was thus a question within the exclusive **jurisdiction** of the Commission over which the trial court had no subject matter jurisdiction.

The holding in *Van Tine I* that subrogation issues are within the exclusive **jurisdiction** of the Commission was recently reaffirmed in *Idaho State Insurance Fund v. Van Tine*, Slip Op. 65 (issued June 9, 1999), ___ P.2d ___ (1999)(*Van Tine II*). The Commission in *Van Tine II* had approved a lump sum settlement for the workers' compensation case. In the agreement, the parties also agreed that the issue of the SIF's subrogation claim would be resolved in one of two related suits that had been filed in district court.

After the Supreme Court ruled in Van Tine I that the district court did not have **jurisdiction** to hear that issue, the SIF petitioned the Commission for a declaratory ruling on the subrogation issue, which petition the Commission denied for lack of timely filing. The SIF appealed. The Court held:

*it is clear that the legislature intended, in order for the workers' compensation law to achieve its purpose of providing sure and certain relief for injured workers and their families, that **all** claims, issues and **civil** actions relating **in any manner** to the injury of a worker, whether **procedural** or **substantive**, be decided under the workers' compensation act by the Commission.*

Van Tine II, Slip Op. 65, p. 10 (emphasis added). The Court expressly stated, "This would also include subrogation issues."

In short, **comparative** negligence can "arise under" Idaho's Workers' Compensation Law when it affects the employer's entitlement to credits and offsets against the third-party recovery under Idaho Code Section 72-223. It is true that the issue of **comparative** negligence is normally litigated in trial court because such a claim is based on common law and Idaho statutory schemes. However, where any substantive or procedural issues relating **in any manner** to a subrogation claim remains unresolved after the conclusion of a district court case, they are to be decided under the Workers' Compensation Act by the Commission.

While the issue before the Commission is one of first impression in Idaho, the matter has been addressed and resolved by the California Supreme Court (Court) in *Roe v. Workmen's Compensation Appeal Bd.*, 12 Cal.3d 884, 528 P.2d 771 (1974). In that case as in this one, the injured worker, Roe, filed a third-party action, but his employer/surety stayed out of the district court proceeding. There, as here, the worker and the third party settled the lawsuit without reference to the employer's concurrent negligence. Roe then applied to the Workers' Compensation Appeals Board (Board) for permanent disability benefits. Roe's attorney, as did Claimant's attorney here, sought to raise the employer's concurrent negligence as a bar to a credit against the surety's liability. The referee and the Board refused to inquire into the employer's concurrent negligence and awarded benefits.

According to California's subrogation statutes, an employer/surety may recover from a third party amounts previously paid an employee through one of three methods: (1) by bringing a direct action against the third party; (2) by joining as a party plaintiff in a suit brought by the employee; or, (3) by applying to the court for a first lien on the judgment recovered by the employee. Thus, Judge Burke in a dissenting opinion concluded that it was clear that whenever the issue of concurrent negligence is raised as a bar to the employer's reimbursement, the adjudication of **fault** would be made by a judicial body. He concluded that favoring the Board with **jurisdiction** of that issue would lead to several substantial problems of administration of justice in addition to introducing **fault** into workers' compensation proceedings contrary to sound principles of workers' compensation and contrary to the California Constitution. The minority's arguments are similar to those raised in this case and were rejected by the majority.

The Court majority held that the Labor Code subrogation provisions are primarily procedural and that the Board has the task of adjudicating the issue of the employer's concurrent negligence when no court has done so and it is raised as a bar to the employer's claim of offset against compensation liability for the amount recovered from the third-party tortfeasor. In doing so, the Court had to resolve two potentially conflicting lines of cases. On the one hand, the law in California, as in Idaho, was clear that:

The subrogation provisions of the [California workers' compensation law] were not designed to permit a negligent employer to take advantage of his own wrong; hence, where the employer's negligence had been established in a prior lawsuit the employee could assert this adjudication as a bar to the employer's claim of credit before the appeals board.

Roe, supra, 528 P.2d at 774 (relying on Nelsen v. Workmen's Comp. App. Bd., 11 Cal.App.3d 472, 89 Cal.Rptr. 638(1970)).

On the other hand, the policy in California, as in Idaho, was equally well established that an employee could not enjoy a double recovery in both tort law and workers' compensation benefits. See Corley v. Workman's Comp. Appeals Bd., 22 Cal.App.3d 447, 99 Cal.Rptr. 242 (1971).

In sum, when the third party lawsuit settles without an adjudication of the employer's negligence, and the employer then seeks to exercise its statutory subrogation rights to reimbursement of benefits already paid or to be paid, the two policies are on a collision course:

Cases like this [Roe] require selection or reconciliation between these policies. In Nelsen, the court implied that the policy of preventing the employer from reaping financial benefit from his own negligence outweighed the policy against the employee's double recovery. In Corley, the court embraced the inhibition against double recovery even at the costs of permitting a negligent employer to reduce his work[ers'] compensation liability.

Roe, 528 P.2d at 774 (citations and revised punctuation omitted).

The California Supreme Court resolved the conflict by holding that the policy denying a negligent employer from recouping its payments to an injured worker took precedence over the policy against the worker's double recovery.

Granting the employer an automatic credit for the employee's damage recovery manifests more solicitude for the employer/carrier than for the employee. The injured work[er] is the prime object of constitutional solicitude. By entertaining the work[er's] Witt v. Jackson defense, the appeals board violates neither constitutional letter nor spirit.

Roe, 528 P.2d at 776. The California Supreme Court's reliance on Witt v. Jackson, 57 Cal.2d 57, 17 Cal.Rptr. 369, 366 P.2d 641 (1961)(holding that an employer may not recover from a third party if his own negligence contributed to the accident), in the central holding of the Roe case is important because the Idaho Supreme Court relied on Witt v. Jackson in establishing its own policy against reimbursement by a negligent employer. See, Liberty Mutual Insurance Company v. Adams, 91 Idaho 151, 417 P.2d 417 (1966).

The Court rejected the employer's allegation that the Board would not be competent to resolve a claim of employer negligence:

The appeals board's lack of experience in adjudicating fault issues is a policy objection of little weight. Sections [of the California worker's compensation law] require the board to alter the amount of the award when either employee or employer has been guilty of serious and wilful misconduct. Serious and wilful misconduct decisions may be complex and difficult. The board may decide a claim of employer negligence with no more and probably less difficulty than the issue of serious and wilful misconduct.

Roe, 528 P.2d at 777.⁶

Despite its holding, the Court appeared troubled at its own conclusion that the Board would be required to adjudicate negligence cases. Nonetheless, the Court concluded that this procedure was dictated by the policy at stake and that any alternative procedure would have to be supplied by the legislature: "Perhaps the courts are better suited than the board to adjudicate the employee's counterthrust of employer negligence. If so, the Legislature may consider appropriate amendments." Id.

Even without considering possible legal maneuvering, the Court concluded that quantification (a mathematical factor for allocating monetary responsibility) is not possible when a third party lawsuit ends in a settlement or award before workers' compensation benefits are fixed, or when the lawsuit is concluded without resolving the issue of employer negligence. The Court further concluded that the question of whether an employee's damage recovery is a workers' compensation benefit is one that is yet to be determined and the quantification thereof may be adjudicated by the Board:

⁶ A major consideration for the California Supreme Court, in finding that the Board must have jurisdiction to resolve allegations of employer negligence was the likelihood that the contrary holding would result in "undesirable gamesmanship" whereby, "A concurrently negligent employer [would] stand aside from the third party lawsuit, then capitalize on the third party's damage payment in the form of a credit from the appeals board." Id. at 776.

To classify the employee's damage recovery as a work[ers'] compensation benefit at the outset of the hearing begs a question yet to be determined. At that point the employee stands before the board with an achieved recovery of damages. If the employer has been negligent, the recovery is unalloyed tort damages; none of it belongs to the employer, none of it is available to offset the employer's compensation liability. If the employer is freed of fault, he is entitled to the offset; to that extent the employee's recovery is the equivalent of work[ers'] compensation benefits (received from the third party in lieu of the latter's liability to the fault-free employer).⁷

Id. The Referee finds this reasoning persuasive.

In conclusion, the Commission has exclusive **jurisdiction** pursuant to Idaho Code Section 72-201, 72-211, 72-707, and 72-223, and Van Tine I and Van Tine II, supra, to hear the issue of alleged **comparative** negligence of Defendant Employer under the facts of this case where that issue has not been resolved in trial court without prior adjudication or agreement of the parties.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings and Conclusions as its own and issue an appropriate final order.

DATED at Boise, Idaho, August 23, 1999.

INDUSTRIAL COMMISSION

/s/ Peggy McMahon, Referee

⁷ This dual system requires the Board to accept the trial court's prior adjudication of employer negligence. See, *Runcorn v. Shearer Lumber Products, Inc.*, 107 Idaho 389 690 P.2d 324 (1984), which essentially has the same requirement:

There is but one cause of action under the statute, and one right to subrogation, and if the action is brought in the employee's name the employer and its surety are bound by estoppel to the results of that trial conducted by the employee. (Citations omitted.)

Id., at 396. The estoppel issue of Employer's negligence is not before the Commission in this recommended decision; nor has there been an adjudication of this matter at district court.

ORDER

Pursuant to Idaho Code Section 72-717, Referee Peggy McMahon submitted the record in the above case, together with her recommended Findings of Fact, Conclusions of Law, and Recommendation to the members of the Industrial Commission for their review. Each of the undersigned Commissioners reviewed the record and considered the Referee's Findings of Fact, Conclusions of Law, and Recommendation. The Commission concurs in the Referee's recommended Findings of Fact and agrees with the Referee's recommended Conclusions of Law. Therefore, the Commission approves, confirms, and adopts the Referee's Findings of Fact, Conclusions of Law, and Recommendation as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. The Commission has exclusive **jurisdiction** pursuant to Idaho Code Section 72-201, 72-211, 72-707 and 72-223; Van Tine v. Idaho State Insurance Fund, 126 Idaho 688, 889 P.2d 717 (1994)(Van Tine I); and Idaho State Insurance Fund v. Van Tine, Slip Op. 65 (issued June 9, 1999, ___ P.2d ___ (1999)(Van Tine II) to hear the issue of alleged **comparative** negligence of Defendant Employer under the facts of this case where that issue has not been resolved in trial court without prior adjudication or agreement of the parties.
2. Pursuant to Idaho Code Section 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED in Boise, Idaho, on this 3rd day of September, 1999.

INDUSTRIAL COMMISSION

/s/ Rachel S. Gilbert, Chairman
/s/ James F. Kile, Commissioner
/s/ James E. Kerns, Commissioner

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,)	
)	
Claimant,)	
)	
v.	)	IC 2008-011032
)	
R&L CARRIERS SHARED)	
SERVICES, L.L.C.,)	
)	
Employer,	)	ORDER BIFURCATING
	)	HEARING AND NOTICE OF
and	)	AMENDED HEARING ISSUES
)	
ZURICH AMERICAN INSURANCE CO.,)	
)	
Surety,	)	FILED
Defendants.	)	APR 13 2011
	)	INDUSTRIAL COMMISSION

INTRODUCTION

On March 21, 2011, Defendants filed a motion to bifurcate and stay proceedings for determination of novel issues of law. Currently, the parties are scheduled for a hearing before Referee Marsters on June 3, 2011. Defendants now request a separate hearing on subrogation issues distinct from the underlying workers' compensation claim issues. Defendants propose that the following threshold issues be addressed prior to hearing on the merits of the underlying workers' compensation claim: (1) whether the release of all claims permits or effects a limitation on R&L Carriers' right of subrogation guaranteed by Idaho Code § 72-223; (2) whether the characterization of the recovery as among Claimant, his wife, and the third parties is binding on R&L Carriers; and (3) whether workers' compensation benefits are community property and, if so, whether a recovery for loss of consortium is also community property.

Because Defendants believe these are issues of first impression and complex issues of law, Defendants request a hearing before the full Commission to adjudicate these subrogation issues.

The parties are in general agreement concerning the relevant facts: Claimant was an employee of R&L Carriers. On or about 2-28-08, Claimant was involved in a compensable work related injury when the vehicle he was driving was struck by another vehicle owned and operated by Ameri-Co Carriers Inc. Claimant filed a workers' compensation claim against his employer for his injuries. That claim was evidently accepted by employer, and workers' compensation benefits in an unspecified amount have been paid to Claimant, or on his behalf, in connection with the injuries he sustained as a result of the accident. A June 3, 2011, hearing is set to determine Claimant's entitlement to additional workers' compensation benefits. Contemporaneous with his pursuit of workers' compensation benefits, Claimant also made claim against Ameri-Co, the negligent third party, for the injuries he sustained as a result of the 2-28-08 accident. In addition to the claim against Ameri-Co made by Claimant, Claimant's wife also made her claim against Ameri-Co for loss of consortium. The claims of both the Claimant and his wife were subsequently resolved for the sum of \$200,000. That settlement is memorialized in a release and indemnity agreement executed by both Claimant and his wife in October 2009. The release and indemnity agreement does not purport to attach a value to the loss of consortium claim of Claimant's wife, nor does the release and indemnity agreement purport to attach a value to the injuries Claimant received as a result of the motor vehicle accident. Rather, the claims of both Claimant and his wife are jointly settled for the sum of \$200,000. Claimant and his wife were represented by D. Scott Summer, Esq., in connection with the claim against Ameri-Co. Pursuant to his agreement with Claimant and Claimant's wife, Mr. Summer took a fee against the \$200,000 settlement in the amount of \$70,000. He also recovered costs advanced in the

amount of \$307.60. In a letter dated November 13, 2009, Mr. Summer purported to attribute \$100,000 of the \$200,000 settlement to Claimant's wife for her loss of consortium claim, with the balance of the settlement attributable to Claimant's injuries.

Defendants claim a right of subrogation to the proceeds of the third party settlement under I.C. § 72-223. Defendants evidently take the position that they are subrogated to the proceeds of the entire settlement, less the attorney's fees incurred by Claimant and his wife in connection with obtaining the settlement.¹ Claimant, on the other hand, contends that at the very least, Defendants' right of subrogation does not attach to that portion of the settlement attributable to the loss of consortium claim of Claimant's wife. Without specifically conceding the point, counsel for Claimant appears to tacitly acknowledge that absent a judicial determination of the value of the loss of consortium claim of Claimant's wife, the unilateral pronouncement of Mr. Summer as to how the proceeds of the \$200,000 settlement should be attributed as between Claimant and his wife is of little assistance in determining the extent of Defendants' I.C. § 72-223 right of subrogation, if, indeed, the portion of the settlement actually attributable to the loss of consortium claim is beyond the reach of Defendants.

The central dispute, then, is whether Defendants' I.C. § 72-223 right of subrogation extends to that portion of the third party settlement payable to Claimant's wife for her loss of consortium claim, and if not, what portion of the third party settlement is actually attributable to the loss of consortium claim. Assuming, but not deciding, that the monies payable to Claimant's wife for loss of consortium are not subject to the Defendants' I.C. § 72-223 right of subrogation, the Commission agrees that it has jurisdiction to consider what portion of the third party settlement is actually attributable to the loss of consortium claim. As Claimant has noted, this is

¹ There may be a dispute between the parties as to the amount of the attorney fee reduction anticipated by I.C. § 72-223(4).

exactly the issue that was before the Commission in the case of *Davis v. Wayne's Transmission*, 1999, IIC 1014 (1999), although that case dealt with the need to address the issue of employer's comparative fault in connection with employer's attempt to assert an I.C. § 72-223 right of subrogation against the proceeds of a third party settlement. Here, Claimant asserts that 50% of the proceeds of the third party settlement are beyond the application of the I.C. § 72-223 right of subrogation, since half of the settlement was paid to Claimant's wife for loss of consortium. To resolve this issue, and assuming, without deciding, that the monies payable for loss of consortium are beyond the application of the provisions of I.C. § 72-223, the task for the Commission is to actually determine what percentage of the third party settlement is attributable to the loss of consortium claim. In the underlying third party claim, Claimant and his wife each had an incentive to maximize their damages. In the context of the instant proceeding, Claimant now has an incentive to maximize only the claim for loss of consortium, since the larger that number turns out to be, the smaller will be the sum to which Defendants' I.C. § 72-223 right of subrogation will attach. At any hearing of the type contemplated in *Davis v. Wayne's Transmission, supra*, the parties will be required to put on proof relevant to establishing what percentage of the \$200,000 third party settlement is fairly attributable to the loss of consortium claim. This will necessitate putting on proof of the value of the loss of consortium claim, as well as proof of the extent and degree of Claimant's damages. The \$200,000 settlement may not have been sufficient to actually compensate Claimant and his wife for their damages. Therefore, a proper apportionment of the \$200,000 settlement cannot be made simply by putting on proof of the value of the loss of consortium claim. It is necessary to ascertain the total damages of Claimant and his wife, and in this fashion establish the relevant ratio to be applied to ascertain

what portion of the \$200,000 settlement is appropriately attributable to the loss of consortium claim.

After reviewing the submissions of the parties, the Commission agrees that it is appropriate to bifurcate this matter to address the following threshold issues:

1. Whether the Release and Indemnity Agreement between Claimant, his wife, and the negligent third party, permits or effects a limitation on Defendants' right of subrogation under I.C. § 72-223;
2. Whether the unilateral characterization of the relative interests of Claimant and his wife in the proceeds of the third party settlement, as set forth in the November 13, 2009, letter of D. Scott Summer, Esq., is binding on Defendants;
3. Whether the recovery by Claimant's wife for loss of consortium in the third party action is a recovery against of which Defendants may assert the I.C. § 72-223 right of subrogation;
4. If not, what percentage of the \$200,000 third party settlement is attributable to the loss of consortium claim;
5. Quite apart from the issues surrounding the loss of consortium claim, to what extent is Claimant's recovery in the third party action community property, and to what extent may Defendants assert an I.C. § 72-223 claim of subrogation to community property, one-half of which is the separate property of Claimant, and one-half of which is the separate property of Claimant's wife; and
6. What is the amount of costs and attorneys fees that should be deducted from Defendants' I.C. § 72-223 recovery pursuant to I.C. § 72-223(4).

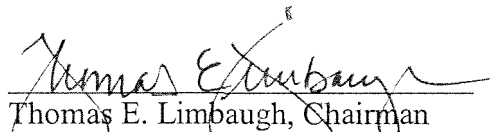
The Commission agrees that it is appropriate to adopt the June 3, 2011, hearing date to address the aforementioned issues. Accordingly, it is hereby **ORDERED** that a bifurcated hearing will be held before the full Commission in the above entitled matter on June 3, 2011, at 9:00 a.m., for one (1) day in the Industrial Commission hearing room, 700 Clearwater Lane, City of Boise, County of Ada, State of Idaho, on the issues set forth above in Paragraphs 1 – 6. The parties shall be ready to proceed at the scheduled time for hearing.

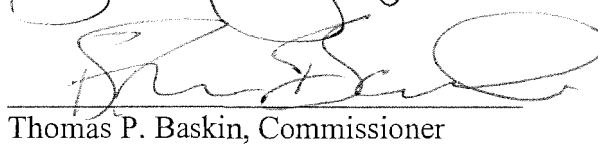
Further, it is **ORDERED** that the issues originally scheduled to be heard on June 3, 2011, as outlined in the January 12, 2011, Notice of Hearing, shall be reserved and held in abeyance for a future hearing.

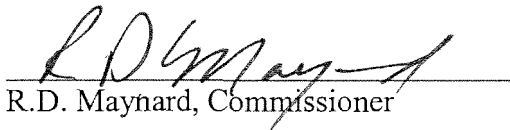
IT IS SO ORDERED.

DATED this 13th day of April, 2011.

INDUSTRIAL COMMISSION

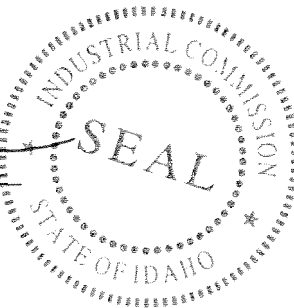

Thomas E. Limbaugh, Chairman


Thomas P. Baskin, Commissioner


R.D. Maynard, Commissioner

ATTEST:

Assistant Commission Secretary



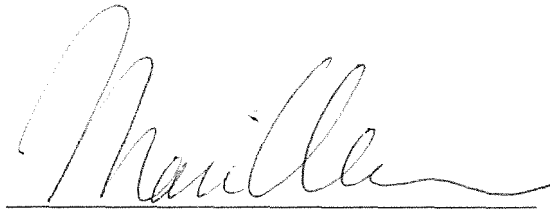
CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2011 a true and correct copy of **ORDER BIFURCATING HEARING AND NOTICE OF AMENDED HEARING ISSUES** was served by regular United States Mail upon:

JON BAUMAN
KRISTINA WILSON
251 EAST FRONT STREET, SUITE 300
PO BOX 1539
BOISE ID 83701

RICHARD OWEN
206 12TH AVENUE ROAD
PO BOX 278
NAMPA ID 83653

amw

A handwritten signature in cursive script, appearing to read "Naville", is written over a horizontal line.

RICHARD S. OWEN, ESQ. (ISB #2687)

206 Twelfth Avenue Road
Post Office Box 278
Nampa, Idaho 83653
Telephone: (208) 466-8700

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

**R&L CARRIERS SHARED
SERVICES, LLC,**

Employer,

and

ZURICH AMERICAN INS. CO.,

Surety,

Defendants.

I. C. No. 2008-011032

MOTION TO COMPEL DISCOVERY

COMES NOW Claimant, by and through his attorney of record, hereby moves this Commission for its Order Compelling Defendants to respond to Claimant's Supplemental Interrogatories to Defendants and Claimant's Supplemental Request for Production of Documents to Defendants filed on or about the 18th day of April, 2011.

MOTION TO COMPEL - PG. 1

DATED this 19 day of May, 2011.

By: *Richard S. Owen*
Richard S. Owen

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19 day of May, 2011, a true and correct copy of the foregoing document was mailed, U.S. Postage prepaid, to:

Jon M. Bauman
Kristina J. Wilson
P.O. Box 1539
Boise, Idaho 83701

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.

Richard S. Owen
Richard S. Owen

RICHARD S. OWEN, ESQ. (ISB #2687)

206 Twelfth Avenue Road

Post Office Box 278

Nampa, Idaho 83653

Telephone: (208) 466-8700

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

**R&L CARRIERS SHARED
SERVICES, LLC,**

Employer,

and

ZURICH AMERICAN INS. CO.,

Surety,

Defendants.

I. C. No. 2008-011032

**REQUEST FOR INCLUSION OF
ADDITIONAL ISSUES**

COMES NOW, Claimant, by and through his attorney of record and hereby requests that the Industrial Commission include the following issues in the hearing now set to commence on July 26 and 27, 2011:

1. The reasonable value of Claimant's third party claim, including the claim of Claimant's wife, Sophia Izaguirre;
2. The reasonable value of the elements of the claim brought by Claimant and his wife

REQUEST FOR INCLUSION OF ADDITIONAL ISSUES - PG. 1

against the third party herein including:

- a. Claimant's past and future medical expense;
 - b. Claimant's past and future wage loss;
 - c. The value of Claimant's wife's past and future loss of consortium; and
 - d. The value of Claimant's past and future general damage.
3. Whether or not the subrogation rights possessed by Surety herein are affected by the adequacy of the settlement made by Claimant of his third party case.
 4. Whether or not the subrogation rights possessed by Surety herein allow Surety to attach that portion of Claimant's third-party settlement which is attributed to Claimant's pain and suffering.
 5. What attorney's fee should be used under Idaho Code 72-223(4) and (5).

DATED This 25 day of May, 2011.

By: Richard S. Owen
Richard S. Owen

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25 day of May, 2011, I mailed a true and correct copy of the foregoing instrument, postage prepaid, to the following:

Jon M. Bauman
Kristina J. Wilson
P.O. Box 1539
Boise, Idaho 83701

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.



Richard S. Owen

Jon M. Bauman
Kristina J. Wilson
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701-1539
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
Bauman - ISB #2989
Wilson - ISB #7962

2011 JUN -3 P 4: 50

RECEIVED
INDUSTRIAL COMMISSION

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION

FOR THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

R&L CARRIERS SHARED
SERVICES, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Surety,
Defendants.

I.C. No. 2008-011032

REQUEST FOR INCLUSION OF
ADDITIONAL ISSUES

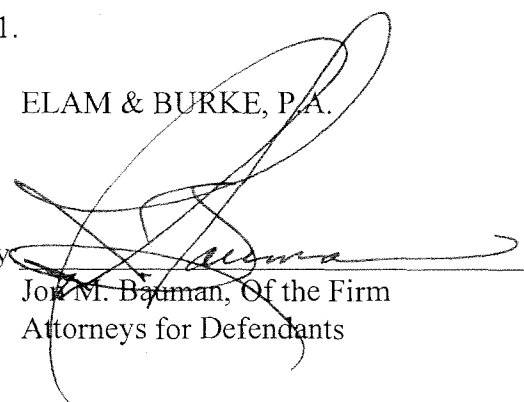
Defendants, by and through their attorneys of record, Elam & Burke, P.A., hereby request that the Industrial Commission include the following issues among those to be heard at the hearing now set to commence on July 26 and 27, 2011:

REQUEST FOR INCLUSION OF ADDITIONAL ISSUES - 1

1. Whether the Industrial Commission has jurisdiction to evaluate the reasonable value of Claimant's third party claim, including the claim of Claimant's wife, Sophia Izaguirre.
2. Whether the Industrial Commission has jurisdiction to evaluate the reasonable value of the elements of the claim brought by Claimant and his wife against the third party.
3. Whether the Industrial Commission has jurisdiction to evaluate the adequacy of the settlement made by Claimant in his third party case.
4. Whether any additional costs and attorney fees should be deducted from Defendants' I.C. § 72-223 recovery, and if so, the basis for deducting them.

DATED this 3 day of June, 2011.

ELAM & BURKE, P.A.

By 
Jon M. Bauman, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of June, 2011, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Richard Owen
RICHARD OWEN LAW OFFICE
206 12th Avenue Road
P.O. Box 278
Nampa, Idaho 83653

☒ U.S. Mail
☐ Hand Delivery
☐ Federal Express
☐ Facsimile Transmission


Jon M. Bauman

RICHARD S. OWEN, ESQ. (ISB #2687)

206 Twelfth Avenue Road

Post Office Box 278

Nampa, Idaho 83653

Telephone: (208) 466-8700

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

**R&L CARRIERS SHARED
SERVICES, LLC,**

Employer,

and

ZURICH AMERICAN INS. CO.,

Surety,

Defendants.

I. C. No. 2008-011032

MOTION TO COMPEL DISCOVERY

COMES NOW, Claimant, by and through his attorney of record, and Moves this Commission for its Order Compelling Defendant to produce documents to Claimant in relation to Claimant's Request for Production Nos. 1, 4, 11.

REQUEST NO. 1: Full and complete copies of any and all records within Defendants' possession or control relating to Claimant's earnings while engaged in his/her employment with Defendant. This request is meant to include photocopies of all paychecks, bonus checks, evidence

MOTION TO COMPEL DISCOVERY -- PG. 1

of tips, or evidence demonstrating compensation of any kind whatsoever.

RESPONSE TO REQUEST NO. 1, DATED 12/14/2011 (sic): Defendants object to this request to the extent it seeks information protected by attorney work-product or attorney-client privilege. Subject to and without waiving the objections, please see the attached documents. Defense counsel requested Claimant's personnel file and will seasonably supplement this answer with any non-privileged information when it is received.

SUPPLEMENTAL RESPONSE TO REQUEST NO. 1, DATED 5/23/2011: Subject to and without waiver of all prior objections and responses to this request for production, Defense counsel has requested Claimant's personnel file and will seasonably supplement this answer with any non-privileged information when it is received.

REQUEST NO. 4: Photocopy of any and all work evaluation documents, including intra-company evaluations concerning Claimant, whether formal or informal. This Request is also meant to include any written or recorded information regarding disciplinary actions taken with regard to Claimant, any wage review procedures, or any other documentation relating to Claimant's job performance.

RESPONSE TO REQUEST NO. 4, DATED 12/14/2011: Defendants object to this request to the extent it seeks information protected by attorney work-product or attorney-client privilege. Subject to and without waiving the objections, Defense counsel requested Claimant's personnel file and will seasonably supplement this answer with any non-privileged information when it is received.

SUPPLEMENTAL RESPONSE TO REQUEST NO. 4, DATED 5/23/2011 : See Supplemental Response to Request No. 4 (sic), above.

REQUEST NO. 11: Please produce any and all documentation within Claimant's personnel

file, medical file or any other files kept on Claimant's behalf by Employer herein. This is meant to include Claimant's application for employment, any records regarding Claimant's wages, any records regarding Claimant's job performance, any records regarding any disciplinary actions taken against Claimant, any records regarding complaints made by Claimant or complaints made against Claimant during the course of his employment with Employer herein, any notices or documentation regarding any injury which Claimant suffered while in the employ of Employer herein, any records generated as a result of any injury suffered by Claimant by Claimant's supervisor or any other person who investigated or was contacted regarding such injury, any records regarding Claimant's off work status as a result of any work injury, any records regarding Claimant's potential return to work following a work-related injury, any records regarding Claimant's ability to return to work following a work-related injury or any records concerning Claimant's retention following a work-related injury.

In summary, this request asks for every piece of paper retained by Employer herein with regard to Claimant's employment, his work related injury, or any matter pertaining thereto.

RESPONSE TO REQUEST NO. 11, DATED 12/14/2010: Defendants object to this request to the extent it seeks information protected by attorney work-product or attorney-client privilege. Defendants further object to the extent the request seeks information from or about non-testing consultants. Subject to and without waiving the objections, Defense counsel requested Claimant's personnel file and will seasonably supplement this answer with any non-privileged information when it is received.

RESPONSE TO REQUEST NO. 11, DATED 5/23/2011: See Supplemental Response to Request No. 4, above.

DATED This 3 day of June, 2011.

By: *Richard S. Owen*
Richard S. Owen

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 3 day of June, 2011, a true and correct copy of the foregoing was mailed, U.S. Postage prepaid, to:

Jon Bauman
P.O. Box 1539
Boise, Idaho 83701

by causing the same to be deposited in the United State Mail, postage prepaid, enclosed in an envelope addressed as above set forth.

Richard S. Owen
Richard S. Owen

RICHARD S. OWEN, ESQ. (ISB #2687)

206 Twelfth Avenue Road

Post Office Box 278

Nampa, Idaho 83653

Telephone: (208) 466-8700

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

**R&L CARRIERS SHARED
SERVICES, LLC,**

Employer,

and

ZURICH AMERICAN INS. CO.,

Surety,

Defendants.

I. C. No. 2008-011032

WITHDRAWAL OF ISSUE

COMES NOW, Claimant, by and through his attorney of record and hereby requests that the Industrial Commission withdraw the listed issues for the hearing now set to commence July 26 and 27, 2011:

1. ~~The reasonable value of Claimant's third party claim, including the claim of Claimant's wife, Sophia Izaguirre;~~
2. The reasonable value of the elements of the claim achieved brought by Claimant and

WITHDRAWAL OF ISSUE - PG. 1

his wife against the third party herein including:

- a. Claimant's past and future medical expense;
- b. Claimant's past and future wage loss;
- c. The value of Claimant's wife's past and future loss of consortium; and
- d. The value of Claimant's past and future general damage.


~~3. Whether or not the subrogation rights possessed by Surety herein are affected by the adequacy of the settlement made by Claimant of his third party case.~~

4. Whether or not the subrogation rights possessed by Surety herein allow Surety to attach that portion of Claimant's third-party settlement which is attributed to Claimant's pain and suffering.

5. What attorney's fee should be used under Idaho Code 72-223(4) and (5).

Claimant requests a telephone conference with the Industrial Commission to discuss the ramifications of the addition/deletion of these issues.

DATED This 6 day of June, 2011.

By: 
Richard S. Owen

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16 day of June, 2011, I mailed a true and correct copy of the foregoing instrument, postage prepaid, to the following:

Jon M. Bauman
Kristina J. Wilson
P.O. Box 1539
Boise, Idaho 83701

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.

Richard S. Owen
Richard S. Owen

✓

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,)	
)	
Claimant,)	
)	
v.	)	IC 2008-011032
)	
R&L CARRIERS SHARED)	
SERVICES, L.L.C.,)	
)	
Employer,	)	ORDER AMENDING HEARING
	)	ISSUES
and)	
)	
ZURICH AMERICAN INSURANCE CO.,	)	FILED
	)	JUN 23 2011
)	
Surety,)	
Defendants.	)	INDUSTRIAL COMMISSION
)	

The Commission held a telephone status conference with the parties on April 18, 2011, to discuss the presentation of evidence and clarify the issues. During the May 17, 2011, telephone conference, the parties were given leave to submit additional issues to the Commission, if desired. Claimant and Defendants both submitted additional issues for the Commission's July 26-27, 2011 hearing with the parties.

On May 26, 2011, Claimant requested inclusion of the following issues:

1. The reasonable value of Claimant's third-party claim, including the claim of Claimant's wife, Sophia Izaguirre;
2. The reasonable value of the elements of the claim brought by Claimant and his wife against the third party herein, including:
 - a. Claimant's past and future medical expense;
 - b. Claimant's past and future wage loss;

- c. The value of Claimant's wife's past and future loss of consortium; and,
 - d. The value of Claimant's past and future general damage.
- 3. Whether or not the subrogation rights possessed by Surety herein are affected by the adequacy of the settlement made by Claimant of his third party case.
 - 4. Whether or not the subrogation rights possessed by Surety herein allow Surety to attach that portion of Claimant's third-party settlement which is attributed to Claimant's pain and suffering.
 - 5. What attorney's fees should be used under Idaho Code § 72-223(4) and (5).

On June 3, 2011, Defendants requested inclusion of the following additional issues:

- 1. Whether the Industrial Commission has jurisdiction to evaluate the reasonable value of Claimant's third-party claim including the claim of Claimant's wife, Sophia Izaguirre;
- 2. Whether the Industrial Commission has jurisdiction to evaluate the reasonable value of the elements of the claim brought by Claimant and his wife against the third party;
- 3. Whether the Industrial Commission has jurisdiction to evaluate the adequacy of the settlement made by Claimant in his third-party case;
- 4. Whether any additional costs and attorney fees should be deducted from Defendants' Idaho Code § 72-223 recovery, and if so, the basis for deducting them.

On June 7, Claimant modified his requested issues for the July 26-27, 2011, hearing before the Commission. Claimant withdrew his first and third additional hearing issue, and modified his second requested issue as follows:

- 2. The reasonable value of the elements of the claim achieved ~~brought~~ by Claimant and his wife against the third party herein, including:
 - a. Claimant's past and future medical expense;

- b. Claimant's past and future wage loss;
- c. The value of Claimant's wife's past and future loss of consortium; and,
- d. The value of Claimant's past and future general damage.

After reviewing the submissions of the parties, the Commission agrees that it is appropriate to amend the issues to be decided at hearing as follows:

1. Whether the Release and Indemnity Agreement between Claimant, his wife, and the negligent third party, permits or effects a limitation on Defendants' right of subrogation under I.C. § 72-223;
2. Whether the unilateral characterization of the relative interests of Claimant and his wife in the proceeds of the third party settlement, as set forth in the November 13, 2009, letter of D. Scott Summer, Esq., is binding on Defendants;
3. Whether the recovery by Claimant's wife for loss of consortium in the third party action is a recovery against which Defendants may assert the I.C. § 72-223 right of subrogation;
4. If not, what percentage of the \$200,000 third party settlement is attributable to the loss of consortium claim;
5. To what extent is Claimant's recovery in the third party action community property, and to what extent may Defendants assert an I.C. § 72-223 claim of subrogation to community property, one-half of which is the separate property of Claimant, and one-half of which is the separate property of Claimant's wife;
6. What is the amount of costs and attorneys fees that should be deducted from Defendants' I.C. § 72-223 recovery pursuant to I.C. § 72-223(4)-(5);
7. The reasonable value of the elements of the claims of Claimant and his wife against the third party herein, including:
 - a. Claimant's past and future medical expense;
 - b. Claimant's past and future wage loss;
 - c. The value of Claimant's wife's past and future loss of consortium; and,
 - d. The value of Claimant's past and future general damage.
8. Whether or not the subrogation rights possessed by Surety herein allow Surety to attach that portion of Claimant's third-party settlement which is attributed to Claimant's pain and suffering;

9. Whether the Industrial Commission has jurisdiction to evaluate the reasonable value of Claimant's third-party claim including the claim of Claimant's wife, Sophia Izaguirre;

10. Whether the Industrial Commission has jurisdiction to evaluate the reasonable value of the elements of the claim brought by Claimant and his wife against the third party; and,

11. Whether the Industrial Commission has jurisdiction to evaluate the adequacy of the settlement made by Claimant in his third-party case.

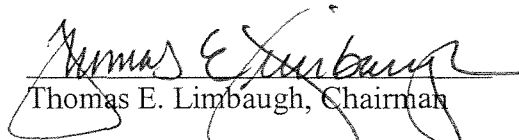
The Commission agrees that it is appropriate to adopt the aforementioned issues. Accordingly, it is hereby **ORDERED** that a bifurcated hearing on these issues will be held before the full Commission in the above entitled matter on July 26, 2011 and July 27, 2011.

The parties shall be ready to proceed at the scheduled time for hearing.

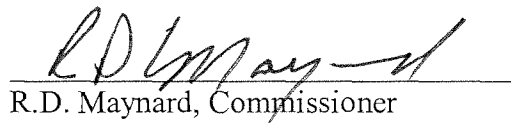
IT IS SO ORDERED.

DATED this 23rd day of June, 2011.

INDUSTRIAL COMMISSION


Thomas E. Limbaugh, Chairman


Thomas P. Baskin, Commissioner


R.D. Maynard, Commissioner

ATTEST:


Assistant Commission Secretary



ORDER AMENDING HEARING ISSUES - 4

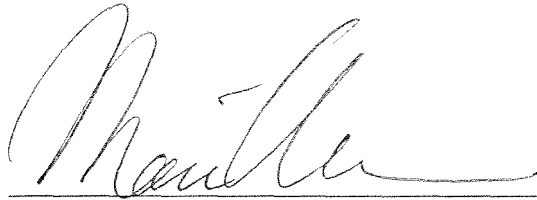
CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2011 a true and correct copy of **ORDER AMENDING HEARING ISSUES** was served by regular United States Mail upon:

JON BAUMAN
KRISTINA WILSON
251 EAST FRONT STREET, SUITE 300
PO BOX 1539
BOISE ID 83701

RICHARD OWEN
206 12TH AVENUE ROAD
PO BOX 278
NAMPA ID 83653

mw

A handwritten signature in cursive script, appearing to read "Matthew", is written over a horizontal line.

✓

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

v.

R&L CARRIERS SHARED
SERVICES, L.L.C.,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Surety,
Defendants.

IC 2008-011032

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

FILED

JAN 31 2012

INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission (Commission) assigned the above-entitled matter to the Commissioners, who conducted a hearing in Boise, Idaho on July 26, 2011. Claimant, Rubio Izaguirre, was present in person and represented by Richard Owen, of Nampa. Defendant Employer, R&L Carriers, and Defendant Surety, Zurich American Insurance, were represented by Jon Bauman, of Boise. The parties presented oral and documentary evidence. Post-hearing briefs were later submitted and the matter came under advisement on September 27, 2011.

ISSUES

The issues to be decided by the Commission as the result of a pre-hearing conference and agreement at the hearing are listed below. They have been reordered from the Order Amending Hearing Issues to correlate with the flow of the discussion in this decision.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1

1. Whether the Industrial Commission has jurisdiction to evaluate the reasonable value of Claimant's third party claim including the claim of Claimant's wife, Sophia Izaguirre;
2. Whether the Industrial Commission has jurisdiction to evaluate the reasonable value of the elements of the claim brought by Claimant and his wife against the third party;
3. Whether the Industrial Commission has jurisdiction to evaluate the adequacy of the settlement made by Claimant in his third party case;
4. Whether the Release and Indemnity Agreement between Claimant, his wife, and the negligent third party, permits or effects a limitation on Defendants' right of subrogation under I.C. § 72-223;
5. Whether the unilateral characterization of the relative interests of Claimant and his wife in the proceeds of the third party settlement, as set forth in the November 13, 2009, letter of D. Scott Summer, Esq., is binding on Defendants;
6. Whether the recovery by Claimant's wife for loss of consortium in the third party action is a recovery against which Defendants may assert the I.C. § 72-223 right of subrogation;
7. If not, what percentage of the \$200,000 third party settlement is attributable to the loss of consortium claim;
8. To what extent is Claimant's recovery in the third party action community property, and to what extent may Defendants assert an I.C. § 72-223 claim of subrogation to community property, one-half of which is the separate property of Claimant, and one-half of which is the separate property of Claimant's wife;
9. What is the amount of costs and attorney fees that should be deducted from Defendants' I.C. § 72-223 recovery pursuant to I.C. § 72-223(4)-(5);
10. The reasonable value of the elements of the claims of Claimant and his wife against the third party herein, including:
 - a. Claimant's past and future medical expense;
 - b. Claimant's past and future wage loss;
 - c. The value of Claimant's wife's past and future loss of consortium; and,
 - d. The value of Claimant's past and future general damage.
11. Whether or not the subrogation rights possessed by Surety herein allow Surety to attach that portion of Claimant's third party settlement which is attributed to Claimant's pain and suffering;

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant suffered a work-related motor vehicle accident resulting in an injury requiring medical treatment and indemnity benefits paid by Defendants. Thereafter, Claimant and his wife entered into a settlement with the third party responsible for the accident. The parties now seek direction from the Commission as to what portion of the proceeds of the third party settlement is subject to Defendants' subrogation claim.

Claimant contends that the Commission has jurisdiction to decide the reasonable value of the elements of the Claimant's third party claim, including the value of the claim of Claimant's wife for her loss of consortium. Claimant does not believe the Commission has jurisdiction to decide the adequacy of the third party settlement. Claimant concedes that the third party settlement and the execution of the Release and Indemnity Agreement do not have any effect on Defendants' right of subrogation in this case. Claimant avers that the attorney fees in the third party settlement, in the amount of thirty-five percent, cannot be modified. Claimant further contends that the loss of consortium damage in this case was damage suffered by the wife alone and is her sole and separate property. Claimant's recovery for pain and suffering, which is never paid by workers' compensation, is his own separate and personal property and not subject to the rights of subrogation.

Defendants agree with Claimant, that the Commission does not have jurisdiction to decide the adequacy of the third party settlement and that the characterization of the settlement has no binding effect on Defendants' right of subrogation. Defendants argue that they are entitled to a right of subrogation in the entirety of a third party settlement, subject only to a deduction for attorney fees and costs. They aver that the Commission does not have the jurisdiction to differentiate between the types of damages or attempt to apportion the settlement.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 3

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits 1-7, and 9-14 admitted at the hearing;
3. Defendants' Exhibits 1-9, 11-40, admitted at the hearing;
4. The testimony of Claimant, Sofia Izaguirre, Lene O'Dell, Martha Peterson, Kurt Holzer, and Merlyn Clark taken at the hearing.

FINDINGS OF FACT

1. Claimant was born in Mexico but moved to Texas when he was twelve years old. Two years later his family moved to California. Claimant completed the eighth grade and began working full time at the age of seventeen. At the time of the hearing, Claimant was 51 years old and resided in Caldwell, Idaho.

2. When Claimant was seventeen he met Sofia, his wife, and they were married three years later. Claimant and his wife moved to Idaho in 1995.

3. Claimant began driving truck when he was 26, and he has spent the majority of his life working as a driver for companies or as a self-employed driver. Most of Claimant's driving allowed him to be home at the end of every day, but some jobs included long hauls lasting up to five consecutive days on the road.

4. At the time of the February 2008 accident, Claimant was employed by R&L Carriers earning between \$1,300 and \$1,600 per week as well as receiving health insurance and disability insurance. Claimant was a combo driver, tasked with driving as well as loading and unloading merchandise.

5. On February 28, 2008, Claimant was involved in a motor vehicle accident. His semi-truck was struck by another semi-truck on the interstate near Snowville, Utah. Claimant's truck and two of the three trailers he was pulling were knocked over. Claimant first sought medical care on February 29, 2008, when he presented at West Valley Medical Center. He was diagnosed with an acute cervical strain and contusions on his chest and left knee, and taken off work for three days.

6. On March 3, 2008, Claimant presented at Saint Alphonsus Medical group Occupational Medicine and was seen by Kevin Chicoine, M.D. Claimant reported that he had mild, non-radiating pain in his neck. Dr. Chicoine imposed restrictions of no lifting, pushing, or pulling in excess of 25 pounds, as well as no squatting or kneeling. Claimant participated in physical therapy and the pain in his chest and neck resolved.

7. Claimant's knee pain continued and an MRI was performed on April 18, 2008, which revealed a left knee cartilage tear. On October 9, 2008, Claimant had arthroscopic surgery on the left knee by William Lindner, M.D. On November 14, 2008, Dr. Lindner released Claimant to full duty work, stating that if he cannot tolerate his work some accommodation from those duties will need to be made. Claimant continued with physical therapy until January 6, 2009.

8. On April 6, 2009, Paul Collins, M.D., conducted an independent medical examination (IME) at Defendants' request. Dr. Collins found some puffiness in Claimant's knee and minimal crepitation in Claimant's left knee. The doctor found that Claimant was not yet stable and recommended a home based exercise program and reported that Claimant seemed well-motivated. The prior restrictions of no squatting or kneeling and no pushing, pulling, or lifting more than 25 pounds were continued. Dr. Collins opined that Claimant did not need

replacement surgery, and Claimant should be given a year with appropriate treatment and therapy before making a decision about surgery.

9. On April 28, 2009, Dr. Lindner declared Claimant had reached maximum medical improvement. Dr. Lindner did not specify Claimant's permanent physical restriction; instead he stated that Claimant's permanent restrictions would be commensurate with the current level of restrictions. Dr. Lindner's prior restrictions were general limitations focused on avoiding work duties that Claimant was not capable of performing.

10. Peggy Wilson, PT, performed a Functional Capacity Assessment of Claimant on June 3, 2009. The results indicated that Claimant had the ability to function at a light-medium to medium work level, but his lifting was limited to 61 pounds. Ms. Wilson reported that Claimant had good eye-hand coordination, good dexterity, and manipulation, as well as good overall body mechanics.

11. Most recently, Claimant had an MRI on January 17, 2011. Dr. Richard Moore reviewed the MRI and concluded that Claimant needed a knee replacement.

12. When asked about his current restrictions at the time of the hearing, Claimant could not detail any limitations. He simply stated that if he has restrictions they are going to be the same as he had before. Claimant testified that he is able to get a full night's sleep without the use of any sleep aids, just Tylenol. He reported that his left knee pain only flares up once in awhile if he walks too much or exerts himself. At another point in the hearing, Claimant testified that his left knee bothers him constantly and keeps him awake part of the night. Claimant does not bend his left knee or squat.

13. Claimant worked continuously for R&L beginning three days after the accident until the surgery in October 2008. After surgery Claimant returned to work in November with a

note from Dr. Lindner stating that Claimant should be allowed to "self-select some of his duties." Claimant testified that he was repeatedly required to hook up trailers using a dolly weighing 2,500 pounds, which Claimant had to push and pull into position. Such work was beyond Claimant's capabilities and caused trouble with Claimant's knee. R&L terminated Claimant's employment on June 3, 2009, and on July 9, 2009, Claimant began working for Old Dominion driving a delivery truck.

14. Claimant worked for Old Dominion for two years, first part time then full time in March of 2010. The full time work for Old Dominion included working at night. The regular schedule was to leave home at 9:30 p.m. and return home at 8:30 a.m. At this time both Claimant and his wife had weekends off. During his work with Old Dominion, Claimant had pain in his knee some days when he used it too much. Claimant was laid off by Old Dominion on June 30, 2011, because Claimant did not divulge the February 2008 accident on his employment application.

15. During his time at Old Dominion, Claimant passed his Department of Transportation physical. Claimant indicated on the form that he had knee surgery on October 9, 2009. The form also reports that Claimant has no problems with the knee, though Claimant denied writing that or telling that to the examiner.

16. At hearing, Claimant testified that he believed he could return to his time of injury job with R&L Carriers with his current knee problems and restrictions. Further, Claimant believes that if he had not been laid off, he could still physically work at his prior job with Old Dominion.

Mrs. Izaguirre

17. Claimant and Mrs. Izaguirre were married in 1980. They have four grown children and three grandchildren. Mrs. Izaguirre has worked outside the home all but two years of their marriage. Mrs. Izaguirre handles the financial aspect of their marriage. Mrs. Izaguirre characterized their marriage as traditional. She testified that Claimant struggles to express his feelings and when he has pain in his knee he shuts down and keeps to himself. Mrs. Izaguirre explained that Claimant will sometimes confine himself to their bedroom even when their children and grandchildren are visiting. Even when Claimant is feeling well, kneeling on the ground to play with grandchildren is difficult. Additionally, connecting with Claimant was difficult because he worked nights. But since Claimant has been out of work he has been home more and the family relations are improving. Additionally, Claimant and his wife have met with their pastor twice for financial counseling since the accident.

Martha Peterson

18. Mrs. Peterson works for Intermountain Claims as a certified case manager. She has been involved as a nurse in the area of workers' compensation for 35 years.

19. Mrs. Peterson was requested to research the cost and recovery time for a total knee replacement, as it is the treatment Claimant may receive in the future. She opined that longevity of a knee replacement is 15 to 20 years. Generally, people under 50 get a different procedure, resurfacing or hemioplasties, to address the knee issues and hold off on a total replacement as long as possible due to the longevity of knee replacements.

20. Mrs. Peterson stated that a patient should be able to return to sedentary work approximately 60-65 days after surgery, and a patient would reach maximum medical

improvement (MMI) in eight to twelve months. During this time, a patient would standardly participate in six to eight weeks of physical therapy, attending three times per week.

21. Mrs. Peterson produced a letter estimating the cost of a total knee replacement at \$8,550.00 with an assist of \$2,565.00. The cost of a resurfacing was estimated at \$6,000.00 with an assist of \$1,800.00. These figures do not include hospital costs.

22. Mrs. Peterson opined that, given a good outcome for a total knee replacement on Claimant, he would be able to return to his time of injury job.

The Third Party Claims

23. June 2008, the Izaguirres retained D. Scott Summer to represent them in a lawsuit against the driver who caused Claimant's industrial accident. On October 22, 2009, Claimant and his wife settled their third party claim for \$200,000. A letter drafted by Mr. Summer after the settlement breaks down the total settlement, attributing \$100,000 to Mrs. Izaguirre's claim for loss of consortium and \$100,000 to Claimant's personal injury claim. Per the attorney/client agreement, Mr. Summer was paid 35% of the settlement amount for his attorney fee, equaling \$70,000.

24. At the date of the third party mediation, Surety had a subrogated interest of \$43,518.65. Surety and the Izaguirres, through their attorney, agreed to the payment of a 25% attorney fee on the recovery of the subrogated amount. Thus, Mr. Summer reimbursed \$32,623.99 to Surety, and retained \$10,879.66 payable as attorney fees.

Kurt Holzer

25. Mr. Holzer is a personal injury attorney in Boise, Idaho. Mr. Holzer has substantial experience with loss of consortium cases in the state. Mr. Holzer was plaintiff's

counsel in a recent case including a loss of consortium claim, during which the jury awarded \$560,000 for the wife's loss of consortium claim. *Phillips v. Erhart*, 151 Idaho 100 (2011).

26. Mr. Holzer was asked by Claimant to evaluate Mrs. Izaguirre's loss of consortium claim. Mr. Holzer reviewed Claimant's medical records and interviewed the Claimant and his wife. The interview focused on the Izaguirres' moral system, their view of the world, and how those were impacted by the Claimant's injuries. Mr. Holzer opined that Mrs. Izaguirre wants her husband to be the leader of the family, the decision maker to whom she can defer to when questions and issues arise. When Claimant secludes himself in their bedroom, Mrs. Izaguirre feels alone and without support. Mrs. Izaguirre also has a fearful attitude about the future and Claimant's ability to provide an income.

27. Starting with the understanding that the Izaguirres received \$200,000 in the settlement, Mr. Holzer estimated that Mrs. Izaguirre's loss of consortium claim is valued at \$50,000. He opined that a jury would have given \$150,000 to Claimant and \$50,000 to Mrs. Izaguirre.

Merlyn Clark

28. Mr. Clark is an attorney in Boise, Idaho focusing in commercial litigation, with a significant portion of time spent in mediation and arbitration. Mr. Clark estimated that around 100 cases involved a claim for loss of consortium, out of the approximately 700 cases he has mediated.

29. Particular to this case, Mr. Clark reviewed the medical records, correspondence, discovery responses, and deposition transcripts. He also reviewed some legal authorities on the matter of claims for loss of consortium in Idaho.

30. Mr. Clark found, in this case, that Claimant's injuries were not severe or disabling. Claimant was only off work for three days directly after the accident. He was off work after his arthroscopic surgery, and Dr. Lindner took Claimant off work because Employer required the performance of work beyond Claimant's restrictions. Mr. Clark found no evidence that Claimant's injuries and restrictions significantly interfered with his family life. In fact, when Claimant was off work he was able to interact with his family in ways he was unable to when working nights. As testified by Mrs. Izaguirre, it was his change to night work that interfered with their family life. Mr. Clark ultimately opined that the loss of consortium claim had a value of \$3,000 to \$5,000.

DISCUSSION AND FURTHER FINDINGS

Jurisdiction

31. The first issues raised in this matter are regarding the jurisdiction of the Commission over this unique case.

32. Claimant contends that the Commission does have jurisdiction to decide the reasonable value of the elements of the Claimant's third party claim, including the value of the claim of Claimant's wife for her loss of consortium. Claimant does not believe the Commission has jurisdiction to decide the adequacy of the third party settlement.

33. Defendants agree with Claimant, that the Commission does not have jurisdiction to decide the adequacy of the third party settlement. They further aver that the Commission does not have the jurisdiction to differentiate between the types of damages or attempt to apportion the settlement.

34. The Commission agrees that there is no need to evaluate the adequacy of the value of the third party settlement. The Commission is ill-equipped to assess a value on the

entirety of the claims brought by Claimant and his wife. Further, the settlement provides us with a realistic value of the claims by the inherent nature of a negotiated settlement which takes account of the strengths and weaknesses of the claims of the parties. Thus, the Commission will make no attempt at evaluating the adequacy of the third party claim.

35. According to Idaho Code § 72-707, “[a]ll questions arising under [the workers’ compensation laws of this state], if not settled by agreement or stipulation of the interested parties with the approval of the commission, except as otherwise herein provided, shall be determined by the commission.” The issue is whether the Commission has jurisdiction to evaluate the claims brought by Claimant and his wife, and the elements within those claims, including the loss of consortium claim. The reason that the Commission has been asked to evaluate the claims of the settlement is to facilitate the future reimbursement of Defendants’ claim of subrogation. It is only in connection with the subrogation claim that this matter is before the Commission.

36. Defendants’ claim of subrogation to proceeds of the third party settlement arises under Idaho Code § 72-223(3), which provides:

If compensation has been claimed and awarded, the employer having paid such compensation or having become liable therefor, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer’s compensation liability.

37. The Idaho Supreme Court has repeatedly held that the Industrial Commission has jurisdiction over questions of subrogation claims under Idaho Code § 72-223. The Court stated that the question of whether the State Insurance Fund was entitled to subrogation pursuant to Idaho Code § 72-223(3) is a question arising under the workers’ compensation law which is within the exclusive jurisdiction of the Industrial Commission. *Idaho State Ins. Fund ex rel. Forney v. Turner*, 130 Idaho 190, 938 P.2d 1228 (1997). The Court has also held that the

Industrial Commission has exclusive jurisdiction of whether a workers' compensation surety had waived its subrogation rights arising under Idaho Code § 72-223(3). *Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 889 P.2d 717 (1994).

38. Pursuant to Idaho Code § 72-707, the Commission is given the jurisdiction to decide matters within its statutory scheme. Here the Commission is being asked to clarify the Defendants' subrogation rights under Idaho Code § 72-223. In order to determine the subrogation right, we must first look at the settlement and evaluate the claims that will be subject to the subrogation right. The questions presented arise under the workers' compensation law and require application of the workers' compensation law; thus, the Industrial Commission has jurisdiction.

The Third Party Settlement

39. The Izaguirres and the third party entered into a settlement agreement releasing the third party from liability on Claimant's personal injury claim as well as Mrs. Izaguirre's loss of consortium claim. The settlement total was \$200,000. A November 13, 2009 letter, signed by the Izaguirres and their prior counsel, attributes \$100,000 to Claimant and \$100,000 to Mrs. Izaguirre's loss of consortium claim. In the pending matter, both Claimant and Defendants agree that the third party settlement and the November 13, 2009 letter memorializing the settlement do not have any binding effect on Defendants' right of subrogation in this case.

40. Claimant contends that the loss of consortium damage is his wife's separate property and that a portion of the settlement represents payment for damages not compensable under the Idaho Workers' Compensation laws; thus, those amounts are not subject to a claim for subrogation. Defendants argue that they are entitled to a right of subrogation in the entirety of a third party settlement, subject only to a deduction for attorney fees and costs.

41. The Idaho Supreme Court addressed the issue of whether an agreement between a third party tortfeasor and an injured employee can restrict the employer's subrogation rights. *Struhs v. Prot. Technologies, Inc.*, 133 Idaho 715, 721, 992 P.2d 164, 170 (1999). In *Struhs*, the claimant was injured in a motor vehicle accident and his workers' compensation surety paid \$21,743.33 in benefits for his injuries. The responsible third party entered into a settlement with the claimant which stated that the settlement was paid for "general damages" alone, a category of damages that does not correspond to any of the various types of benefits payable under the workers' compensation laws. Therefore, claimant argued that surety's I.C. § 72-223 right of subrogation could not attach to the proceeds of the third party settlement. The Court rejected this argument, holding that claimant could not unilaterally characterize the third party recovery in an attempt to prevent surety from exercising its right of subrogation:

It is a matter of first impression before this Court whether an agreement between a third-party tortfeasor and an injured employee can restrict the employer's subrogation rights. In automobile insurance cases, we have held that an insurer is not bound by a decision to which it was not a party. *Vaught v. Dairyland Ins. Co.*, 131 Idaho 357, 361, 956 P.2d 674, 678 (1998); see also *Anderson v. Farmers Ins. Co. of Idaho*, 130 Idaho 755, 757, 947 P. 2d 1003, 1005 (1997). Employers have a statutory right to subrogation, and any characterization of damages to which the employer is not privy cannot change the employer's statutory rights. A contrary holding could lead to situations where employees and third-party tortfeasors reached unilateral agreements that would give the employee a double recovery or result in the culpable party not shouldering its full responsibility for damages – results that would be diametrically opposed to the purposes of the subrogation statute. See *Presnell v. Kelly*, 113 Idaho at 3, 740 P.2d at 45. Therefore, we hold that an employee and third party's unilateral actions cannot restrict an employer's subrogation rights.

Other jurisdictions have reached a like result. In Minnesota, an employee may settle a tort claim with the third party without employer's consent, but such a settlement cannot affect the employer's subrogation rights. *Naig v. Bloomington Sanitation*, 258 N.W.2d 891, 893 (Minn. 1977). Similarly, the Colorado Court of Appeals held that where workers' compensation benefits extended only to "economic" benefits, the surety was not bound by an employee's unilateral settlement with a third party that classified the settlement as one purely for

noneconomic damages. *Sneath v. Express Messenger Serv.* 931 P.2d 565, 568 (Colo. Ct. app. 1996).

For these reasons, we affirm the Industrial Commission's conclusion that Wausau could exercise its subrogation rights against Struhs' settlement with the Army.

42. Of course, this case is different from *Struhs* in that Claimant does not insist upon the application of the allocation of the proceeds of settlement which was attempted by Claimant's former counsel. Indeed, Claimant acknowledges that such a unilateral allocation is invalid under *Struhs*. Rather, what Claimant proposes is that the evidentiary hearing of July 26, 2011 provided the parties an opportunity to adduce evidence and make argument on how the proceeds of settlement should be allocated, and in this way accomplish the allocation which was prohibited by claimant's unilateral attempt at the same in *Struhs*. In short, per Claimant, *Struhs* does not prohibit the protection of certain elements of a third party recovery from the subrogation claim of the surety. *Struhs* merely prohibits Claimant from undertaking this action unilaterally. Defendants, on the other hand, argue that the Idaho statutory scheme clearly anticipates that the right of subrogation attaches to the entirety of a third party recovery, less surety's responsibility for the payment of its proportionate share of costs and attorney fees. Defendants argue that *Struhs* is, at the very least, consistent with this proposition.

43. In the context of the question of whether or not a portion of the proceeds of a third party settlement are not subject to the I.C. § 72-223 right of subrogation, *Struhs* is just as important for what it does not say, as what it says. Having specifically found that the claimant in *Struhs* could not affect the surety's right of subrogation by incorporating certain language into the third party settlement to which surety was not a party, the Court concluded that the language of the agreement must be ignored, and that surety's right of subrogation was deemed to extend to the entire third party recovery. Had the Court been of the view that I.C. § 72-223 limited

surety's right of subrogation to that portion of the proceeds of a third party recovery which corresponded to workers' compensation benefits paid, it would, presumably, have found it necessary to remand the matter to the Commission for further proceedings along the lines of the inquiries which are before the Commission in the instant matter. That the Court did not do this in *Struhs*, is telling, and consistent with the plain language of I.C. § 72-223(3), which specifies:

If compensation has been claimed and awarded, the employer having paid such compensation or having become liable therefor, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer's compensation liability.

44. In connection with its discussion of the employer's obligation to pay its proportionate share of attorney fees and costs incurred by claimant in obtaining the third party recovery, the Court in *Cameron v. Minidoka Highway District*, 125 Idaho 801, 874 P.2d 1108 (1994) paraphrased the extent of the employer's right to be subrogated to the third party recovery as follows:

Under this statute, when an employer is liable to a claimant for worker's compensation benefits, and the claimant obtains a recovery against a third party for the same injuries, the employer becomes subrogated to the claimant's rights in the third party recovery to the extent of the employer's compensation liability. I.C. Section 72-223(3). The plain wording of the statute entitled employers to benefit from third party recoveries to the extent of their compensation liability, whether the employer has already paid the compensation or the compensation liability remains to be paid in the future. It is undisputed in this case that the claimants' recovery from Union Pacific not only reimbursed the surety for the compensation benefits already paid to the claimants, it also extinguished all of the surety's liability to pay future compensation.

45. We believe that a plain reading of the statute fails to reveal an intention on the part of the legislature to limit a surety's subrogated interest in a third party recovery to that portion of the third party recovery which corresponds to a benefit payable under the workers' compensation laws of this state. To construe the provisions of I.C. § 72-223(3) otherwise, would

frustrate the statutes' dual purposes of achieving an equitable distribution between responsible parties by assuring that the discharge of an obligation be paid by the person who in equity and good conscience ought to pay it and to prevent the injured claimant from obtaining a double recovery for an injury. (See, *Presnell v. Kelly*, 113 Idaho 1, 740 P.2d 43 (1987)).

46. In so ruling, we recognize that claimant and surety may, of course, make their own agreement concerning the allocation of the proceeds of a third party settlement. Disputes of the type currently before the Commission could be avoided by encouraging claimants and subrogated sureties to address whether and/or how the proceeds of a third party recovery are to be allocated, contemporaneous with the settlement of the third party claim. If claimant and the subrogated carrier cannot come to agreement, then perhaps the third party settlement will be impeded. However, that is preferable to avoiding the issue, settling the third party case, and trusting the Industrial Commission to ascertain how the proceeds of a third party settlement of a personal injury claim should be allocated to special and general damages, and whether the settlement corresponds to workers' compensation benefits paid. This is an assessment that we are both ill-equipped and disinclined to undertake. Our ruling today encourages resolution of this important issue at the front end, i.e., at the time of the resolution of the third party claim, as it should be.

47. Although we have found that the entire proceeds of the settlement of Mr. Izaguirre's claim are subject to the I.C. § 72-223 right of subrogation, this does not end our inquiry, since the settlement resolves not only Mr. Izaguirre's claim against the third party tortfeasor, but *also* Mrs. Izaguirre's claim against the third party tortfeasor for loss of consortium. Because the right created by I.C. § 72-223(3) for the benefit of the surety who has paid workers' compensation benefits, extends only to the "employee's" right to recover against a

negligent third party, we feel constrained by the language of the statute to ascertain which portion of the third party settlement is fairly attributable to Mrs. Izaguirre's claim for loss of consortium. We agree with Claimant that such portion of the third party settlement that is fairly attributable to the resolution of Mrs. Izaguirre's claim for loss of consortium is not subject to Surety's I.C. § 72-223(3) right of subrogation.

48. First, although the claim for loss of consortium does depend, in the first instance, on the fact that Mr. Izaguirre suffered an injury, and is, in that sense, derivative, it is also clear that the claim for loss of consortium is personal to Mrs. Izaguirre. As an element of non-economic damages, i.e. as a measure of Mrs. Izaguirre's loss of the companionship, services, and affection of her injured spouse, such damages constitute the separate property of Mrs. Izaguirre. *See, Rogers v. Yellowstone Park Company*, 97 Idaho 14, 539 P.2d 566 (1974). As such, the entire portion of the third party settlement attributable to Ms. Izaguirre's claim for loss of consortium is protected from the subrogation claim of Surety.

49. With the above findings, the Commission is now required to place a value on Mrs. Izaguirre's loss of consortium claim. The Commission agrees that Mrs. Izaguirre has suffered a loss of consortium, and that the settlement agreement resolves her claim. However, attaching a dollar amount to that loss is a difficult task of a type the Commission does not routinely perform.

50. The Commission will focus on the testimony of Claimant and his wife in its synthesis of the particular facts which demonstrate the loss of the aid, care, comfort, society, companionship, services, protection and conjugal affection of Claimant due to his injuries. Further, the expert opinions of Mr. Holzer and Mr. Clark will serve as guides in determining a monetary value for Mrs. Izaguirre's claim and will be discussed below.

51. The expert opinions on the overall value of all claims by the Claimant and his wife diverge, as one might expect. Mr. Holzer found that the Izaguirres had been undercompensated by the \$200,000 settlement; while Mr. Clark found that they had been overcompensated, valuing the claim at \$155,000. Thus, in comparing the opinions it is important to note that Mr. Holzer constrained his value of the loss of consortium claim to the total value of the settlement, even though he argued that the total settlement was low. In order to better compare the expert opinions we must place them into the confines of the \$200,000 settlement. Mr. Holzer's loss of consortium calculation was made under the assumption of a \$200,000 value of the total claims. However, Mr. Clark's valuation must be adjusted by using the ratio of \$5,000 to \$155,000. Accordingly, we calculate the high end of Mr. Clark's opined value to be approximately \$6,450. Therefore, comparing the expert opinions under the assumption of a \$200,000 value, we find the range of expert opinions to be from \$6,450 to \$50,000 attributable to Mrs. Izaguirre's loss of consortium claim.

52. Mr. Holzer testified that the loss of consortium claim is worth a third to a quarter of the entire settlement, but his written opinion ultimately states \$50,000. Mr. Holzer further explained that he estimated the value of Claimant's claim and reached his conclusion on the value of the loss of consortium claim by defining the loss of consortium claim as having a value equal to some fraction of Claimant's claim. Mr. Holzer explained that Mrs. Izaguirre feels a loss in the marriage because of a lack in intimate companionship. Mrs. Izaguirre feels embarrassed to pressure Claimant and she suffers from emotional turmoil and anger at Claimant because he is not always emotionally and physically available.

53. Mr. Clark found no evidence that Claimant's injuries and restrictions significantly interfered with his family life. When Claimant was off work he was able to interact with his

family in ways he was unable to when working nights. As testified by Mrs. Izaguirre, it was his change to night work that interfered with their family life.

54. Mrs. Izaguirre has stable employment earning \$20.70 per hour. She keeps the bank account for the couple, fills out any required forms or paperwork, and provides interpretation for Claimant when necessary. Mrs. Izaguirre testified that when Claimant's left knee was hurting him he would become grumpy. Claimant does not participate in as many physical activities such as bike riding, walking, and playing with the grandsons because of his knee.

55. The restrictions and pain caused by Claimant's left knee have changed the way he behaves and interacts with his wife. Yet the physical restrictions may not be as severe as Claimant now avers. When questioned about his restrictions, Claimant was unable to recall any restrictions for his knee. He is not taking any medication for pain relief other than Tylenol occasionally. The Izaguirres still take walks and ride bikes together. Additionally, Claimant has stated that he is physically able to return to work at his time of injury job.

56. Claimant was not working nights when the Izaguirres entered into the third party settlement and therefore, Claimant's absence from the family was less dramatic at the time a monetary value was accepted by the Izaguirres. Further by the time this case reached hearing, Claimant was no longer working nights and was home most of the time due to his unemployment. While it is uncertain what future work schedules Claimant may hold, it is clear that working nights is not a physician imposed restriction and is not something that has been mandated by Claimant's industrial injuries. The troubles felt by Mrs. Izaguirre while Claimant was working nights are understandable but they are not worthy of great value in her loss of consortium claim.

57. Mrs. Izaguirre looks to Claimant as the leader of the family. The loss of patriarchal leadership is indeed important, but the effect that Claimant's injury has had on his leadership role is in question. He is not on prescription medication and needs no aids to sleep at night. Working nights impeded Mrs. Izaguirre's time and companionship with Claimant, but as of the date of hearing, that impediment had been removed.

58. The Commission is more persuaded by the analysis of Mr. Clark. As opined by Mr. Clark, the testimony as a whole establishes that Claimant is not in severe pain and his injury has not produced minimal specific and concrete harm to Mrs. Izaguirre. Further, many of the problems created when Claimant was working at night are negligible for the reasons discussed above. Yet in adopting the opinion of Mr. Clark, the Commission finds it lacked sufficient recognition for the loss of familial leadership suffered by Mrs. Izaguirre. In reviewing the evidence, particularly the testimony of the Izaguirres and the legal experts, the Commission concludes that Mrs. Izaguirre's claim for loss of consortium, evaluated within the confines of the Izaguirres' third party settlement, has a value of \$9,000, which is not subject to Defendants' right of subrogation. The remainder of the settlement is subject to subrogation, minus attorney fees and costs, for future compensation benefits.

Attorney Fees

59. The final issue is determining the amount of costs and attorney fees that should be deducted from Defendants' Idaho Code § 72-223 recovery pursuant to Idaho Code § 72-223(4)-(5). Idaho Code § 72-223(4)-(5) provide several options for how the attorney fees and costs may be borne by claimant and employer.

4) Unless otherwise agreed, upon any recovery by the employee against the third party, the employer shall pay or have deducted from its subrogated portion thereof, a proportionate share of the costs and attorney's fees incurred by the

employee in obtaining such recovery unless one (1) or more of the following circumstances exist:

(a) If prior to the date of a written retention agreement between the employee and an attorney, the employer has reached an agreement with the third party, in writing, agreeing to pay in full the employer's subrogated interest;

(b) If the employee alleges or asserts a position in the third party claim adverse to the employer, then the commission shall have jurisdiction to determine a reasonable fee, if any, for services rendered to the employer;

(c) If there is a joint effort between the employee and employer to pursue a recovery from the third party, then the commission shall have jurisdiction to determine a reasonable fee, if any, and apportion the costs and attorney's fees between the employee and employer.

(5) If the amount recovered from the third party exceeds the amount of the subrogated portion payable to the employer for past compensation benefits paid, then to the extent the employer has a future subrogated interest in that portion of the third party recovery paid to the employee, the employer shall receive a credit against its future liability for compensation benefits. Such credit shall apply as future compensation benefits become payable, and the employer shall reimburse the employee for the proportionate share of attorney's fees and costs paid by the employee in obtaining that portion of the third party recovery corresponding to the credit claimed. The employer shall not be required to pay such attorney's fees and costs related to the future credit prior to the time the credit is claimed. However, the employer and employee may agree to different terms if approved by the industrial commission.

60. Per I.C. § 72-223(4) "unless otherwise agreed," where a third party recovery is obtained, the surety shall pay from its share of the recovery, a proportionate share of the costs and attorney fees incurred by claimant in pursuit of the third party claim. The record establishes that following settlement of the third party claim, Claimant's then attorney, Scott Summer, took a 35% contingent fee, or \$70,000. As well, Claimant incurred and paid costs in the amount of \$307.60.

61. We have found that Mrs. Izaguirre's claim for loss consortium has a value of \$9,000.00, thus leaving \$191,000.00 of the \$200,000.00 settlement subject to the claim of Surety. Surety's proportionate share of costs and fees incurred in connection with the pursuit of the third party claim is therefore \$67,143.76.

62. Following settlement of the third party claim, Claimant's former counsel held in trust the sum of \$43,518.65, representing the workers' compensation subrogation claim as of the date of the settlement of the third party claim. The proportionate share of costs and attorney fees attributable to a recovery of this sum is \$15,298.46. Therefore, by operation of statute, Surety was only entitled to receive \$28,251.19 as of the date of settlement of the third party claim. However, Mr. and Mrs. Izaguirre, through their former attorney, actually reimbursed to Surety the sum of \$32,623.99, after having agreed to a reduction of the Surety's obligation to reimburse Claimant for its proportionate share of costs and attorney fees incurred in obtaining the sum of \$43,518.65. Why Claimant's former attorney acceded to this arrangement is unclear, but the record is undisputed that the arrangement was a result of an agreement between Mr. and Mrs. Izaguirre and Surety.

63. I.C. § 72-223(4) makes it clear that the parties are authorized to make an agreement that surety shall reimburse claimant for something less than its proportionate share of attorney fees and costs. (*See*, I.C. § 72-223(4)). We feel constrained to honor this agreement, at least insofar as it relates to the \$43,518.65 previously paid to Surety. However, we do not feel constrained to apply this same reduction to the balance of Surety's entitlement to the balance of the \$191,000.00, which is subject to the Claimant's subrogation. There is no evidence that the parties have reached any agreement that Claimant shall be paid something other than what is contemplated by statute for attorney fees he incurred in obtaining the balance of the settlement subject to the subrogation claim. Therefore, on the balance of the settlement proceeds subject to Surety's right of subrogation (\$147,481.35), Surety is obligated to pay the sum of \$51,845.25 as its proportionate share of attorney fees and costs incurred by Claimant in pursuit of the third party recovery.

64. As set forth in the monetary breakdown above, the amount received by Claimant from the third party settlement exceeds the amount of the subrogated portion that has been paid to Defendants. At the time of the third party settlement, Claimant reimbursed Surety the sum of \$32,623.99 for compensation paid as of that date. To the extent Defendants have a future subrogated interest in the remaining portion of the third party recovery paid to Claimant, Defendants shall received a credit against its future liability for compensation benefits. (See, Idaho Code §72-223(5)). Such a credit shall apply as future compensation benefits become payable, not necessarily upon issuance of this decision.

CONCLUSIONS OF LAW AND ORDER

1. The Commission has jurisdiction to evaluate the claims in Mr. and Mrs. Izaguirre's third party settlement and determine which claims will be subject to Defendants' right of subrogation under Idaho Code § 72-223.

2. The entire proceeds of the settlement of Claimant's claim are subject to the Idaho Code § 72-223 right of subrogation. Mrs. Izaguirre's claim for loss of consortium is not subject to the Idaho Code § 72-223 right of subrogation.

3. The value of Mrs. Izaguirre's loss of consortium claim portion of the third party settlement, which is not subject to Defendants' right of subrogation, is \$9,000.

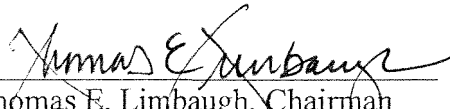
4. The prior recovery by Defendants of a portion of Claimant's third party settlement with a proportionate share of fees and costs deducted, will be enforced as agreed upon by the parties. However, on the balance of the settlement proceeds subject to Surety's right of subrogation (\$147,481.35), Surety is obligated to pay the sum of \$51,845.25 as its proportionate share of attorney fees and costs incurred by Claimant in pursuit of the third party recovery.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

IT IS SO ORDERED.

DATED this 31st day of January, 2012.

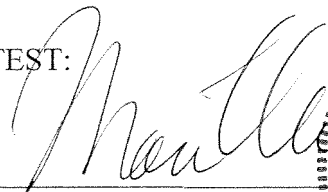
INDUSTRIAL COMMISSION

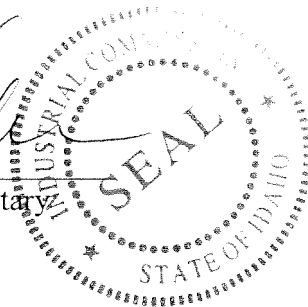

Thomas E. Limbaugh, Chairman


Thomas P. Baskin, Commissioner


R.D. Maynard, Commissioner

ATTEST:


Assistant Commission Secretary



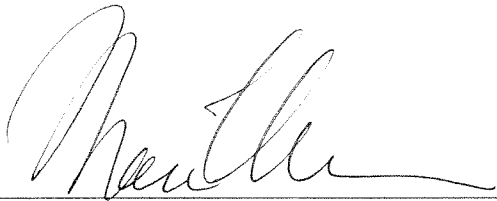
CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 2012 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon:

JON BAUMAN
KRISTINA WILSON
251 EAST FRONT STREET, SUITE 300
PO BOX 1539
BOISE ID 83701

RICHARD OWEN
206 12TH AVENUE ROAD
PO BOX 278
NAMPA ID 83653

mw



RICHARD S. OWEN, ESQ. (ISB #2687)

206 Twelfth Avenue Road

Post Office Box 278

Nampa, Idaho 83653

Telephone: (208) 466-8700

Attorney for Claimant/Appellant

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant/Appellant,

vs.

**R&L CARRIERS SHARED
SERVICES, L.L.C.,**

Employer/Respondent,

and

ZURICH AMERICAN INS. CO.,

Surety/Respondent,

I. C. No. 2008-011032

NOTICE OF APPEAL

2012 MAR -5 P 1:00
RECEIVED
INDUSTRIAL COMMISSION

TO: THE ABOVE-NAMED SURETY AND EMPLOYER, by and through their attorney of record, Jon M. Bauman, Boise, Idaho and THE CLERK OF THE IDAHO INDUSTRIAL COMMISSION.

NOTICE IS HEREBY GIVEN that the above-named Appellant, RUBIO IZAGUIRRE, hereby appeals against the above-named Respondents to the Idaho Supreme Court from the final order of the Industrial Commission entered in the above-entitled action on the 31st day of January, 2012.

NOTICE OF APPEAL -- PG. 1

YOU ARE FURTHER NOTIFIED as follows:

1. The party has a right to appeal to the Idaho Supreme Court, and the judgements and/or orders described above are appealable orders under and pursuant to Rule 11(d).
2. The entire reporter's standard transcript as defined in Rule 25(A) I.A.R. is requested;
3. The Appellant requests the following documents to be included in the agency's record in addition to those automatically included under Rule 28, I.A.R.:
 - (a) All briefs filed by the parties including exhibits and attachments thereto and the original decision herein;
 - (b) All deposition transcripts lodged with the Commission;
 - (c) All exhibits admitted into evidence.
4. I certify;
 - (a) That the Industrial Commission has been paid the estimated fee of \$100.00 for preparation of the transcript;
 - (b) That the estimated fee for preparation of the agency's record has been paid;
 - (c) That the appellate filing fee has been paid; and
 - (d) That service has been made upon all parties required to be served, pursuant to Rule 20.

DATED This 2 day of March, 2012.


By: Richard S. Owen
Richard S. Owen

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2 day of March, 2012, I mailed a true and correct copy of the foregoing instrument, postage prepaid, to the following:

Jon M. Bauman
P.O. Box 1539
Boise, Idaho 83701

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.



Richard S. Owen

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant/Appellant,

v.

R&L CARRIERS SHARED SERVICES,
L.L.C.,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Surety,

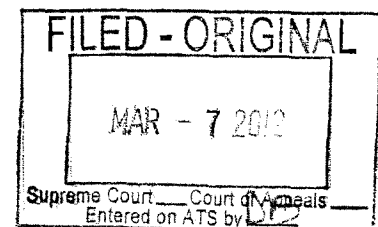
Defendants/Respondents.

SUPREME COURT NO. 39750

CERTIFICATE OF APPEAL

Appeal From:	Industrial Commission, Thomas E. Limbaugh, Chairman presiding
Case Number:	IC 2008-011032
Order Appealed from:	Findings of Fact, Conclusions of Law, and Order, filed January 31, 2012.
Attorney for Appellant:	Richard S. Owen P.O. Box 278 Nampa, ID 83653
Attorney for Respondents:	Jon Bauman Kristina Wilson P.O. Box 1539 Boise, ID 83701
Appealed By:	Rubio Izaguirre, Claimant

CERTIFICATE OF APPEAL FOR RUBIO IZAGUIRRE - 1



122

Appealed Against:

R&L Carriers Shared Services, L.L.C. and
Zurich American Insurance Co., Defendants

Notice of Appeal Filed:

March 5, 2012

Appellate Fee Paid:

\$100.00 to Industrial Commission;
\$86 check to be reissued by Counsel for Claimant

Name of Reporter:


M.D. Willis, CSR
M.D. Willis, Inc.
P.O. Box 1241
Eagle, ID 83616

Transcript Requested:

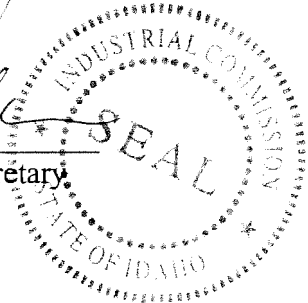
Standard transcript has been requested. Transcript
has been prepared and filed with the Commission.

Dated:

March 6, 2012




Assistant Commission Secretary




CERTIFICATION

I, Marie Wilson, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Appeal; Findings of Fact, Conclusion of Law, and Order; and the whole thereof, in IC case number 2008-011032 for Rubio Izaguirre.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 6th day of March, 2012.


Assistant Commission Secretary



RICHARD S. OWEN, ESQ. (ISB #2687)

206 Twelfth Avenue Road

Post Office Box 278

Nampa, Idaho 83653

Telephone: (208) 466-8700

Attorney for Claimant/Appellant

**~~BEFORE THE SUPREME COURT OF THE STATE OF IDAHO~~
BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

RUBIO IZAGUIRRE,

Claimant/Appellant,

vs.

**R&L CARRIERS SHARED
SERVICES, L.L.C.,**

Employer/Respondent,

and

ZURICH AMERICAN INS. CO.,

Surety/Respondent,

I. C. No. 2008-011032

**AMENDED
NOTICE OF APPEAL**

TO: THE ABOVE-NAMED SURETY AND EMPLOYER, by and through their attorney of record, Jon M. Bauman, Boise, Idaho and THE CLERK OF THE IDAHO INDUSTRIAL COMMISSION.

NOTICE IS HEREBY GIVEN that the above-named Appellant, RUBIO IZAGUIRRE, hereby appeals against the above-named Respondents to the Idaho Supreme Court from the final order of the Industrial Commission entered in the above-entitled action on the 31st day of January, 2012.

AMENDED NOTICE OF APPEAL -- PG. 1

2012 MAR -9 P 1:11
RECEIVED
INDUSTRIAL COMMISSION

YOU ARE FURTHER NOTIFIED as follows:

1. The party has a right to appeal to the Idaho Supreme Court, and the judgements and/or orders described above are appealable orders under and pursuant to Rule 11(d).

2. The entire reporter's standard transcript as defined in Rule 25(A) I.A.R. is requested;

3. A preliminary statement of issues on appeal:

(a) Whether Industrial Commission erred as a matter of law in deciding that the Defendants' subrogation rights pursuant to Idaho Code 72-223 extended to all of Claimant's third-party settlement, including any monies which Claimant received for pain and suffering, and;

(b) Whether the Industrial Commission erred in failing to designate part of Claimant's settlement as pain and suffering.

~~3~~.4. The Appellant requests the following documents to be included in the agency's record in addition to those automatically included under Rule 28, I.A.R.:

(a) All briefs filed by the parties including exhibits and attachments thereto and the original decision herein;

(b) All deposition transcripts lodged with the Commission;

(c) All exhibits admitted into evidence.

~~4~~. 5. I certify;

(a) That the Industrial Commission has been paid the estimated fee of \$100.00 for preparation of the transcript;

(b) That the estimated fee for preparation of the agency's record has been paid;

(c) That the appellate filing fee has been paid; and

AMENDED NOTICE OF APPEAL -- PG. 2

(d) That service has been made upon all parties required to be served, pursuant to Rule 20.

DATED This 6 day of March, 2012.

By: *Richard S. Owen*
Richard S. Owen

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6 day of March, 2012, I mailed a true and correct copy of the foregoing instrument, postage prepaid, to the following:

Jon M. Bauman
P.O. Box 1539
Boise, Idaho 83701

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.

Richard S. Owen
Richard S. Owen

Jon M. Bauman
Kristina J. Wilson
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701-1539
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
Bauman - ISB #2989
Wilson - ISB #7962

Attorney for Defendants/Respondents

BEFORE THE INDUSTRIAL COMMISSION
FOR THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

R&L CARRIERS SHARED
SERVICES, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Surety,
Defendants.

I.C. No. 2008-011032

REQUEST THAT ADDITIONAL
DOCUMENTS BE INCLUDED IN
AGENCY'S RECORD

FILED

MAR 21 2012

INDUSTRIAL COMMISSION

REQUEST THAT ADDITIONAL DOCUMENTS BE INCLUDED IN AGENCY'S RECORD -

1

Jon M. Bauman
Kristina J. Wilson
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701-1539
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
Bauman - ISB #2989
Wilson - ISB #7962

Attorney for Defendants/Respondents

BEFORE THE INDUSTRIAL COMMISSION
FOR THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant,

vs.

R&L CARRIERS SHARED
SERVICES, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Surety,
Defendants.

I.C. No. 2008-011032

REQUEST THAT ADDITIONAL
DOCUMENTS BE INCLUDED IN
AGENCY'S RECORD

2012 MAR 23 P 12:25
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INDUSTRIAL COMMISSION

REQUEST THAT ADDITIONAL DOCUMENTS BE INCLUDED IN AGENCY'S RECORD -

Pursuant to Idaho Appellate Rule 28(c), Respondents R&L Carriers Shared Services, LLC and Zurich American Insurance Co., request the additional documents be included in the agency's record in addition to those automatically included under Idaho Appellate Rule 28(b)(3):

(a) All motions filed by the parties including exhibits and attachments thereto.

DATED this 21 day of March, 2012.

ELAM & BURKE, P.A.

By: 

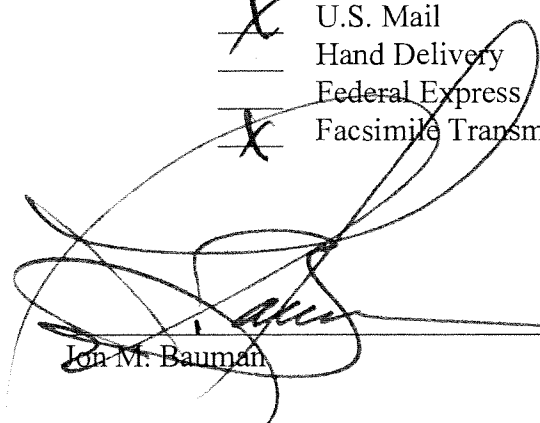
Jon M. Bauman, Of the Firm
Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of March, 2012, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Richard Owen
RICHARD OWEN LAW OFFICE
206 12th Avenue Road
P.O. Box 278
Nampa, Idaho 83653

☒ U.S. Mail
☐ Hand Delivery
☐ Federal Express
☒ Facsimile Transmission


Jon M. Bauman

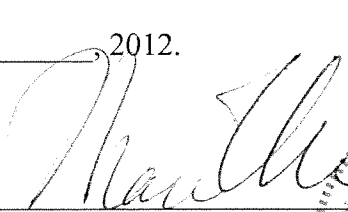
REQUEST THAT ADDITIONAL DOCUMENTS BE INCLUDED IN AGENCY'S RECORD -

CERTIFICATION OF RECORD

I, Marie Wilson, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 39750-2012 on appeal by Rule 28(b)(3) of the Idaho Appellate Rules, the Notice of Appeal, pursuant to the provisions of Rule 28(b), and the Defendants'/Respondents' Request that Additional Documents be Included in the Agency's Record, pursuant to the provisions of Rule 28(c).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits. Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Agency's Record herein.

DATED this 30th day of March, 2012.


Assistant Commission Secretary



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,

Claimant/Appellant,

v.

R&L CARRIERS SHARED SERVICES,
L.L.C.,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Surety,

Defendants/Respondents.

SUPREME COURT NO. 39750-2012

NOTICE OF COMPLETION

TO: STEPHEN KENYON, Clerk of the Courts; and
Richard S. Owen, for the Claimant/Appellant; and
Jon Bauman/Kristina Wilson, for the Defendant(s) Employer & Surety/Respondents.

YOU ARE HEREBY NOTIFIED that the Agency's Record was completed on this date,
and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been
served by regular U.S. mail upon each of the following:

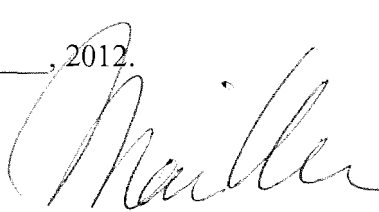
Richard S. Owen
P.O. Box 278
Nampa, ID 83653

Jon Bauman
Kristina Wilson
P.O. Box 1539
Boise, ID 83701

NOTICE OF COMPLETION
(S.C. Docket # 39750-2012 Re: Rubio Izaguirre - 1

YOU ARE FURTHER NOTIFIED that, pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from this date in which to file objections to the Agency's Record, including requests for corrections, additions or deletions. In the event no objections to the Agency's Record are filed within the twenty-eight day period, the Reporter's Transcript and Agency's Record shall be deemed settled.

DATED this 30th day of March, 2012.


Marie Wilson
Assistant Commission Secretary



NOTICE OF COMPLETION
(S.C. Docket # 39750-2012 Re: Rubio Izaguirre - 2